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THE

DOCTRINE AND LAW

OF

MARRIAGE, ADULTERY,

AND

DIVORCE;

EXHIBITING A

THEOLOGICAL AND PRACTICAL VIEW

OF

THE DIVINE INSTITUTION OF MARRIAGE;

THE RELIGIOUS RATIFICATION OF MARRIAGE;

THE IMPEDIMENTS WHICH PRECLUDE AND VITIATE THE CONTRACT OF MARRIAGE;

THE RECIPROCAL DUTIES OF HUSBANDS AND WIVES;

THE SINFUL AND CRIMINAL CHARACTER OF ADULTERY;

AND

THE DIFFICULTIES WHICH EMBARRASS THE PRINCIPLE AND PRACTICE OF DIVORCE:

WITH AN APPENDIX,

CONTAINING AN ESSAY ON THE HELLENISTIC AND ECCLESIASTICAL MEANING OF THE WORD ΠΟΡΝΕΙΑ, ORDINARILY TRANSLATED FORNICATION.

Συζυγιης αλυτοιο συνωριδα διζυγα. Nonnus.

Sed prudentissima proculdubio est libertatis divortiorum coercitio, sive libidinis ansas evitandas, sive successiones, sive publicam aliter pacem atque pietatem spectes. *Selden, Ux. Ebr.* l. iii. c. 34.

BY

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THE

DOCTRINE AND LAW

OF

MARRIAGE, ADULTERY, AND DIVORCE.

ADVERTISEMENT.

THE reader of the following pages is earnestly entreated to suspend his judgment, until he has considered the series of argument which they contain, and of which it is the one purpose to establish the doctrine of the holiness and the indissolubility of marriage, on the basis of its divine institution. How far the Author has succeeded in the support of this doctrine, it is not his province to determine: he can ascertain and avouch no more than the honest persuasion of his own mind, and a perfect conviction, that not a thought is suggested, which can prejudice the interests of Christian righteousness. When however he has considered the high authorities which he has ventured to oppose, the extent to which he has carried his theory, and the nature of some of the arguments, and the obsolete expositions of Scripture, by which he has endeavoured to sustain it, he is free to confess, that he has at times distrusted his own judgment, and been apprehensive

that his mind may have been unduly biassed in favour of a particular system, conceived and matured in retirement, and with contracted means and opportunities of information and research. The argument nevertheless results in such an appearance of consistency, as induces a hope that it is constructed on a just principle, and that the views which have been taken by the Author may not be unworthy of the public attention. The first desire and delight of his heart is to investigate and defend the truth, to remove the occasions of offence, to ascertain the principles and enforce the practice of private virtue, and to assist in the promotion of social improvement: but the experience and observation of life have rendered him not sanguine or precipitate in the anticipation of religious union or moral renovation; and in the slow and guarded process of theological disquisition he has learned not to ask or to give assent to any proposition which does not rest on the arguments of manly reason, or the dictates of inspired authority.

It is not necessary to state the circumstances which engaged the Author's attention in the enquiry, in the prosecution of which he first collected and weighed the several texts of Scripture which speak of

the doctrine of Marriage, and proceeded to follow that doctrine through all the relics of the three first centuries, observing the diction as well as the opinions of the primitive writers, and taking advantage of the light of various learning which Selden and other authors have thrown upon the question. The law has been collected chiefly from the Commentaries of Blackstone, the Parliamentary Debates, and the Term Reports; and when other resources have failed, the public journals have not been neglected.

No man has more occasion than the Author to regret, that the doctrine which he has undertaken to treat has not found a more able and more competent advocate, nor can any man be more sensible of the imperfection of the present attempt. The vital importance of a doctrine too generally neglected is the best apology which he can offer for presuming to intrude his sentiments on the public, and for entreating that candid consideration of the argument which is due to the interest of the subject, and the censures of such liberal criticism as may correct the errors and supply the deficiencies of the execution.

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THE

DOCTRINE AND LAW

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MARRIAGE, ADULTERY, AND DIVORCE.

INTRODUCTION.

THERE is a passage in the Book of Wisdom, in which the author of that apocryphal treatise enters into a copious detail of the pernicious consequences and effects of idolatry, which he concludes with specifying "changing of kind, disorder in marriages, and shameless uncleanness[a]."

It would be one of the most useless and unsatisfactory of labours, to insist upon the tendency of a practice, which there is no temptation to commit, to enforce the testimony of a writer, to whose authority no deference is due, or to compile an elaborate comment upon an expression which has perplexed the commentators, but in the exposition of which no man feels any interest or concern. The changing of kind, and disorder in marriages, are phrases of doubtful meaning and import. The change of kind has been variously interpreted, of unnatural affections, of the counterfeiting of sex, which was usual in some of the heathen superstitions, and of the

[a] Wisdom xiv. 26.

introduction of a supposititious and illegitimate issue, by adultery and illicit intercourse, especially of Jews with Gentile women: the disorder in marriages has been supposed to denote either incestuous marriages contracted against the rules of the Levitical law, whether within the forbidden degrees, or with the forbidden nations, or, according to the translation of the Vulgate, unsettled marriages which might be dissolved at the pleasure of the parties. The latter exposition is grounded upon the former, and comprehended under it: and it is the former sense which is most agreeable to the original expression, (αταξια γαμων, q. d. ατακτοι γαμοι, marriages out of the prescribed order,) and which would most naturally occur to the mind of a Jew, especially in deducing that disorder from idolatry. In either sense it suggests an important question; What is the order, and what is the permanent bond, of marriage? the want of which amounts to such disorder in marriages, as a Jew would ascribe to idolatry, and as is seen in the affairs of ordinary life to produce the most fatal and unhappy results.

This is a practical question, which is worthy at all times to engage the attention of the moralist and the divine, and of which, upon his own account, or for the sake of those who are dear unto him, every man is concerned to possess a clear and distinct apprehension. As the first and most ancient covenant for mutual good; as the original foundation of all human relations; as the rock upon which the goodly fabric of social happiness and social duty has been constructed; and from the roots of which issue the salutary streams of public virtue and domestic bliss;

marriage has a claim upon every man to understand its doctrine and its law, and to be acquainted at least with its primary principles and its essential obligations. It was justly argued by Lord Mansfield, that no reasonable man can contemplate the state of marriage, and not be convinced that it is a state in which all the amiable passions are engaged and interested in the cause of virtue and truth; from which the best and most essential felicities of life derive their origin; which enhances the joys and divides the unavoidable sorrows of humanity; which diffuses its beneficial influence alike through the palace and the cottage; and pours the balm of consolation into the breast that is wounded by affliction, whether resulting from sudden calamity and change of fortune, or from personal pain and individual infirmity[b].

It is the sound theory of another distinguished and eloquent lawyer[c], that "almost all the relative duties of human life will be found more immediately, or more remotely, to arise out of the two great institutions of PROPERTY and MARRIAGE: they constitute, preserve, and improve society: upon their gradual improvement depends the progressive civilization of mankind: on them rests the whole order of civil life. These two great institutions convert the selfish, as well as the social, passions of our nature into the firmest bands of a peaceable and orderly intercourse: they change the sources of discord into the principles of quiet: they discipline the

[b] See Woodfall's Parliamentary Reports, vol. vii. p. 11.

[c] Sir James Mackintosh: "Discourse on the Study of the Law of Nature and Nations."

most ungovernable, they refine the grossest, and exalt the most sordid propensities; so that they become the perpetual fountain of all that strengthens, and preserves, and adorns society; they sustain the individual, and they perpetuate the race. Around these institutions all our social duties will be found at various distances to range themselves: some more near, obviously essential to the good order of human life; others more remote, and of which the necessity is not at first view so apparent; and some so distant, that their importance has been sometimes doubted, though upon more mature consideration they will be found to be out-posts and advanced guards of these fundamental principles; that man should securely enjoy the fruits of his labour, and that the society of the sexes should be so wisely ordered, as to make it a school of the kind affections, and a fit nursery for the commonwealth."

There is a feeling in the heart of every man which immediately corresponds with these eloquent descriptions, and under the influence of which it is not unreasonable to suppose, that no man will be indifferent in the search, or find any difficulty in the acquirement, of the best and most accurate information upon the doctrine and law of marriage. This reasonable expectation however is more often disappointed than fulfilled. In the intercourse of ordinary life; in the conversation of educated men, informed on every other topic; in the proceedings of the courts of law and of parliament, which on all other subjects abound with acuteness and practical wisdom; and in the marked and singular inaccuracy with which these proceedings are reported by the

daily press; there is evidence of a want of knowledge, of an absence of settled conviction, of a vacillation of principle, which is not found to prevail on any other question of moral duty. There is a laxity of opinion on the nature of marriage, its divine institution, and religious solemnization. Men have affirmed the competence of human laws to multiply the impediments of matrimony, and have not scrupled to deny the validity of marriages, contracted under circumstances which are by no means sufficient to preclude or vitiate the contract. They have thrown doubts on the obligation and perpetuity of the bond of marriage; and the guilt of the adulterer, the wrong of the injured husband, and all the sins of impurity, are treated with a levity which is not applied to any other instance of private vice, or civil injury. There is a facility in palliating and excusing, if not in recommending and approving, the voluntary separation of married persons; and there is a precipitancy in asserting the rights of divorce, and the dissolution of a lawful marriage. In all these respects there is a disorder in marriages which requires to be counteracted; an apathy which needs to be stimulated; an ignorance which demands instruction; or a misapprehension which deserves correction and restraint.

Whether it is that the pure doctrine of marriage has been polluted by irrelevant disquisitions, in which men of virtuous minds refuse to participate; or whether its principles and laws "have been deemed too evident to require the support of argument, and almost too sacred to admit the liberty of discussion;" or whether the defence has been

neglected because no man has had the hardihood to open the assault; it is certain, that while the library of the English theologian is crowded with volumes of theological erudition on all other points, the doctrine of marriage has been singularly neglected. Detached pieces have appeared, as different parts of the doctrine have been called in question; but no English writer, with the single exception of Selden, has embraced the whole subject of marriage, adultery, and divorce: and even the *Uxor Ebraica* is always deficient in the moral application, has no reference to the present state of English law, and is often at least ambiguous in respect of the religious principles and solemn sanctions, which constitute the virtue of marriage, the sin of adultery, and the awful hazard of divorce. The doctrine has been more worthily treated upon the continent, and the work of Gerhard, *De Conjugio*, will remain a perpetual monument of his learning, and his zeal for virtue, piety, and truth. But the works of Gerhard and of Selden are not accessible to the ordinary reader, who is probably unacquainted with the very title of the former, and who will hardly be invited to study the embarrassed style of Selden, or to bear the weight of his learned authority, unless he is drawn by a peculiar motive to engage in the investigation. The work of Comber on the Office of Matrimony, as far he was conducted by the text, on which he professed to comment, is of the highest value; but his works have ceased to command the attention to which they will always be entitled by their intrinsic merit. The eight treatises of Domestical Duties, by William Gouge, the Puritan divine, are all but un-

known. The chapters in which Paley treats of the public use of marriage institutions, of seduction, of adultery, divorce, and marriage, in the midst of many valuable observations, contain some principles which it is not possible to approve, and which cannot be recommended without exception and reserve. The formulary for the solemnization of marriage is regarded as a form for a particular occasion, although if it were considered a manual of useful instruction, from which the ignorant might seek, and the wise be confirmed in, the knowledge of practical duty; or if married men would be persuaded to review the vows of their marriage, as the clergy are instructed to review the vows of their ordination; there would be the less occasion of investigating the principles, and maintaining the rules, of conjugal duty as they are unfolded in the word of truth, and accommodated to the practice of daily life.

No man can read the Office for the Solemnization of Matrimony in the Church of England, without observing that the general doctrine is exhibited in terms clear, unambiguous, and calculated to preclude the possibility of disorder in marriages. "Holy matrimony" is declared to be "an honourable estate, instituted by God in the time of man's innocency, and therefore is not by any to be enterprized, nor taken in hand, unadvisedly, lightly, or wantonly . . . but reverently, discreetly, soberly, and in the fear of God." It is pronounced to be "God's holy ordinance." At the time of the celebration, the congregation, supposed to be present, are required to speak, "if any man can shew any just cause why the two persons to be married may not be lawfully

joined together," and the parties themselves are challenged in words of the most impressive solemnity to confess, "if either of them know any impediment why they may not be lawfully joined together," and they are assured, "that so many as are coupled together otherwise than God's word doth allow, are not joined together by God, neither is their matrimony lawful." To be coupled together otherwise than God's word doth allow, is the only case, contemplated by the Church, in which the parties are not joined together by God, and in which their matrimony is not lawful: all other marriages are supposed to be valid, and on a just presumption, founded in the silence of all parties, that there is no such impediment or contravention of God's word, the mutual consent of the parties is asked and declared: and upon this consent they severally stipulate, that they will live together in the discharge of their reciprocal duties, according to God's holy ordinance, so long as they both shall live, and until death shall part them. A ring, in token of mutual trust and continual love, is then given by the man to the woman, whom he weds and contracts to himself in the name of the Father, and the Son, and the Holy Ghost. The minister, after a short prayer, joins their hands together, reciting the impressive words in which our Lord hath laid down the law of marriage: Those whom God hath joined together, let no man put asunder: and he pronounces them to be man and wife in the name of the Father, and the Son, and the Holy Ghost. The office concludes with benedictions, prayers, a psalm of thanksgiving, and Scriptural instructions on the

duties of husbands towards their wives, and wives towards their husbands.

This is the unequivocal doctrine of the Church of England concerning marriage, that it is a divine institution, and that being once, without lawful impediment contrary to God's word, contracted, its duties cannot cease, its obligations cannot be vitiated or dissolved, but by the death of one of the parties. As far as the Church is concerned there can be no disorder of marriages; and if the principle maintained by the Church, and the chief expressions of her ritual, be traced to the remotest period, they will be found to coincide with the highest and most commanding authorities, with the clearest and most continuous current of opinion in favour of the permanent validity and obligation of the bond of marriage.

It is not, however, the least difficulty which embarrasses the doctrine of marriage, that there is, or is supposed to be, a marked and striking discrepancy in the principles held by the Law and the Church of England; that while the Church maintains the divine institution of marriage, and deduces all the rules of marriage from divine authority, the Law is content to hold that marriage is a civil contract, and to argue upon the obligations of marriage, in reference only to the civil contract.

"Our Law," says Blackstone, "considers marriage in no other light than as a civil contract[d]." This is the first distinction between the Church and the Law: the Church affirms that marriage is God's holy ordinance, a state instituted by God: the Law

[d] Commentaries, vol. i. c. 15.

considers it to be a civil contract; at the same time it accumulates upon this simple contract the necessity of a religious ratification, without which, both by the common law and by particular statutes, the parties cannot contract as is required, "in due form of law."

"In general all persons are able to contract themselves in marriage, unless they labour under some particular disabilities and incapacities. These disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical law to avoid the marriage in the spiritual court: but these, in our law, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity or relation by blood; affinity or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion, in order to separate the offenders, and inflict penance for the offence *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void, because such declaration cannot

now tend to the reformation of the parties. By Statute 32 Hen. VIII. c. 38. it is declared, that all persons may lawfully marry, but such as are prohibited by God's law, and that all marriages contracted by lawful persons in the face of the Church and consummate with bodily knowledge and fruit of children, shall be indissoluble. And (because, in the times of popery, a great variety of degrees of kindred were made impediments to marriage, which impediments might, however, be bought off for money,) it is declared by the same statute that nothing (God's law except) shall impeach any marriage without the Levitical degrees[e]."

There is a subtlety in this legal distinction between void and voidable marriages, which ordinary minds are not prepared to entertain. From the process of reasoning that it is sinful to attempt to contract matrimony under such circumstances, it seems natural to expect that the contract should be void, on the principle that no man may take benefit of his own wrong, rather than that the marriage should be voidable, i. e. that its validity should be approved, at the same time that it is liable to a restricted sentence of nullity. The same inference might be thought justly deducible from the statute: if marriages without the Levitical degrees are indissoluble, it is not a remote conclusion that marriages within those degrees, or otherwise contrary to God's word, are void. The statute coincides with the expression of the Liturgy, concerning those who are joined together otherwise than God's word doth

[e] 1 Bl. Com. c. 15.

allow, and of whom the Church declares that they are "not joined together by God, neither is their matrimony lawful:" and yet, in equal opposition to the Liturgy and the statute, it is the received exposition of the law, that marriages within the Levitical degrees are only voidable, not *ipso facto* void, are not void *ab initio*, but voidable only by sentence of separation. It is also a singular arrangement which includes infirmities in the same class with disabilities grounded on divine prohibitions.

"The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And though some of them may be grounded upon natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil inconveniences make the contract void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all. They do not put asunder those who are joined together, but they previously hinder the junction. And if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union[f]."

In the case of voidable marriages the Law affirms what the Church disavows: in the case of marriages legally void, it annuls what the Church approves: for whatever may be these legal disabilities, with the single exception of those who are coupled together otherwise than God's word doth allow, the Church

[f] 1 Bl. Com. c. 15.

contemplates no nullity of marriage, no incapacity of forming the contract, no meretricious union, but pronounces the parties man and wife, bound to each other until death shall part them, engaged to forsake all other, and to keep only the one to the other, and joined together by God in such manner that no man may put them asunder.

"The first of these legal disabilities is a prior marriage, or having another husband or wife living[g]." Under such circumstances the parties would be coupled together otherwise than God's word doth allow; and, whatever forms or words may be used, their matrimony is not lawful, they are not joined, because they are not in a condition to be joined, together by God, whose institution and law are opposed to polygamy. The Church and the Law are therefore agreed in recognizing this disability: but if the disability is founded in the Scriptures, and the divine law of marriage, and is not the mere creation of municipal law, does it not fall under the legal definition of voidable, rather than of void, marriages? Or does not analogy require that other marriages, voidable because they are interdicted, should be also void? It is not pretended that the law vitiates the marriage of the bigamist only on the ground of its civil inconvenience.

"The next legal disability is want of age. Therefore, if a boy under fourteen, or a girl under twelve, years of age, marry, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent aforesaid, they may disagree, and

[g] 1 Bl. Com. c. 15.

declare the marriage void, without any divorce or sentence of the spiritual court. In our law it is so far a marriage, that if at the age of consent they agree to continue together, they need not to be married again[h]."

Marriages of persons of such tender years are in this country of very rare occurrence: and the law of inchoate or imperfect marriages, and the personal right of voiding them, is appropriate to an age and country in which the espousals and the marriage are separate and distinct. It is certain that the Church of England contemplates nothing but a definitive solemnization of marriage, independent of all contingencies of agreement or disagreement, assent or dissent, at a future period. The parties take each other from this day forward, under every change of circumstances, until death shall part them.

Another incapacity is want of reason. "The statute, 15 Geo. II. c. 30, has provided, that the marriage of lunatics, and persons under frenzies, shall be totally void[i]."

The want of reason, as it implies a natural incapacity of entering into any contract, is a most just and reasonable impediment of marriage; and the fraudulent collusion and concealment of this incapacity, is a just ground of annulling the marriage, which, by its primitive institution, and by the existing formulary, supposes a capacity and freedom in both parties, to declare their assent. These and other disabilities, which render the marriage voidable or void, must be in existence at the time of the

[h] 1 Bl. Com. c. 15. [i] Ibid.

marriage, and cannot be inferred from circumstances subsequent to the marriage.

The marked disagreement between the ecclesiastical and municipal laws, in respect of the contract of marriage, is seen to pervade its rule as well as its principle. Thus the Church, in conformity with the divine institution, and with the great end of mutual society, which matrimony was designed to promote, forbids any man to put asunder those whom God has joined together, and requires their constant cohabitation, that they shall live together in the discharge of their several duties, forsaking all other, and cleaving the one to the other so long as they both shall live. But the Law, interpreted by the judgments of the courts, has been on many occasions but too ready to give its sanction and countenance to acts of private and mutual separation. Again, the Church, in the just but quaint language of one of its Homilies, pronounces adultery a filthy sin; but the secular Law regards it only in the light of a civil injury, for which the husband may obtain satisfaction by an action of trespass *vi et armis* against the adulterer. The intercourse of the sexes out of marriage is also left to the feeble coercion of the spiritual courts, and hardly recognized by the Law as a crime, except with reference to the civil injury; so that unless a man can prove the value of his daughter's services, he can procure no redress for her seduction: and a woman is under no responsibility to the law of bastardy so long as she can maintain the issue of an illicit intrigue. So extraordinary is the impartiality which the law displays in the administration of

justice, entitling the poor to redress, and exempting the rich from punishment. In the law of divorce it may be sufficient to allude to this most striking difference in the ecclesiastical and parliamentary practice; the ecclesiastical courts holding the indissolubility of marriage, and looking prospectively to the reconciliation of the parties, grant no divorce *a mensa et thoro*, without an express condition and bond, that the parties shall not, during each other's life, contract matrimony with any other person; the practice of parliament requires the exhibition of this sentence of restricted divorce, as a preliminary condition of obtaining a bill of divorce *a vinculo*, enabling the parties to proceed to a new marriage.

When there is such discrepancy between the ecclesiastical and municipal laws pervading the whole doctrine and law of marriage, it is not unnatural that the minds of men should be in doubt and perplexity on one of the most vital questions of moral duty: and for the correction of the disorder which prevails on the principle and rule of matrimony, and in the absence of more comprehensive treatises, it is proposed to collect, from the Scriptures, from the writings of primitive antiquity, and from the various authorities which throw light on the subject, a theological and practical view of the divine institution of marriage, of the religious ratification of marriage, of the impediments which preclude and vitiate the contract of marriage, of the reciprocal duties of husbands and wives, of the sinful and criminal character of adultery, and of the difficulties which embarrass the principle and practice of divorce. In this enquiry into the true doctrine of

matrimony, it will be attempted to ascertain how far the tenets of the Church are true and worthy to be maintained, and in what respects the provisions of the Law are in need of revision. The appeal is confidently made to the authority of the Scriptures, on which the doctrine of the Church is founded, and with which the laws which regulate the social institutions of a Christian state ought in all things to correspond. The following passage of the Gospel of Saint Matthew compared with the parallel narrative of Saint Mark, comprehends the Christian doctrine and law of marriage, and is the basis of the proposed investigation.

"The Pharisees also came unto him, tempting him, and saying unto him, Is it lawful for a man to put away his wife for every cause? And he answered and said unto them, Have ye not read, that he which made them at the beginning, made them male and female; and said, For this cause shall a man leave father and mother, and shall cleave to his wife; and they two shall be one flesh? Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder. They say unto him, Why did Moses then command to give a writing of divorcement, and to put her away? He said unto them, Moses, because of the hardness of your hearts, suffered you to put away your wives; but from the beginning it was not so. And I say unto you, Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery: and whoso marrieth her which is put away doth commit adultery. His disciples say unto him, If the case of a

man be so with his wife, it is not good to marry. But he said unto them, All men cannot receive this saying, save they to whom it is given. For there are some eunuchs that are so born from their mother's womb: and there are some eunuchs that are made eunuchs of men; and there be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive it, let him receive it[k]."

[k] Matt. xix. 3—12.

CHAPTER I.

THE DIVINE INSTITUTION OF MARRIAGE.

THE principal sources of theological truth are the plain assertions of the Scriptures, understood in connexion with the context, and with the scope and object of the writer: unavoidable and necessary inferences from one or more texts of Scripture, judiciously interpreted and collated; and the doctrine universally held by the primitive Church, in uninterrupted tradition from the Apostles.

In the distinct and marked difference which prevails between the supposed doctrine of the Law, and the avowed doctrine of the Church of England, concerning the nature of marriage, it is satisfactory to know that the doctrine of the Church is supported by all the authority and proof of which a theological proposition is susceptible; and that the Scriptures and primitive antiquity agree, in vindication of the assertions of the Liturgy, that marriage is "God's holy ordinance," that it was "instituted by God," and that the "Almighty God at the beginning did create our first parents, Adam and Eve, and did sanctify and join them together in marriage." There is the same authority in favour of the more distant and less distinct allusions of the Homily, to this institution of matrimony, ordained by God, and to God, the author of marriage[a].

[a] Homily on the State of Matrimony.

In the brief history of the creation it is expressly recorded, that after Adam was put in possession of paradise, and invested with authority over other creatures, the Lord God said, It is not good that the man should be alone; I will make him an help meet for him[b]. This is the record of the divine purpose concerning the institution of marriage: it seemed not good to the Divine wisdom that the man should be alone, without society, and without the means, which the other animals possessed, for the continuance of his kind: and it seemed good to the same wisdom, that there should be provided an help, meet and suitable for him, an auxiliary which was required in the nurture and education of his children, in the management of domestic affairs, in the communication of reason, and the exercise of piety; a faithful and consolatory associate and partner of evil and of good, connected with him in the closest and most indissoluble union of conjugal fidelity and affection. In execution of this divine purpose of mercy, the Lord God made the woman, and he brought her unto the man[c]: and when he had thus made them male and female, or a male and a female[d], appropriating one man to one woman, by a law, which in the course of providence has never failed, God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. Thus, in

[b] Gen. ii. 18. [c] Gen. ii. 22. [d] Gen. i. 27. Ainsworth in loc.

the words of an ancient father of the Church, God not only formed the woman, but united her with the man, according to the law which still remains; he conducted her to the man, and himself became the bridegroom, (at once the paranymph and the priest,) and in giving her away he added his blessing as a portion to the marriage. God, her builder, says Ainsworth in the quaint language of his day, was also her bringer, and so her conjoiner in her marriage with the man[e]. When the woman was thus introduced to him, Adam instantly exclaimed, This is now bone of my bone, and flesh of my flesh; she shall be called Woman, because she was taken out of man[f].

The history of this part of the divine institution of marriage, both in the design and in the effect, is of obvious and easy interpretation. There is more difficulty in appropriating the words which follow Adam's acknowledgment of his intimate union with Eve, and which contain the primitive law of marriage: Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh[g]. These words have been variously applied; to Adam, in conjunction with the words immediately preceding, and to Moses, as a casual remark of the historian in recording the institution of marriage: and as both Adam and Moses

[e] Theophylact. περὶ γάμου. apud Gerhard, Tractat. de Conjugio, sec. 44. Ainsworth in Gen. ii. 22.

[f] Gen. ii. 23. See Gerhard, s. 44. who records the strange conceit of Rabbi Abraham Ben Esra, that the Hebrew words imply the divine presence with the married pair, and the withdrawing of that presence, on their disobedience.

[g] Gen. ii. 24.

were divinely inspired, the words in this application may be primarily referred to God, and shewn to possess a divine force and authority[h]. The greatest of all commentators has, however, ascertained and defined their meaning and exclusive appropriation: He who made them at the beginning, made them male and female; and said, For this cause shall a man leave his father and mother, and cleave unto his wife; and they two shall be one flesh[i]. In dependence upon this divine comment, it has been suggested, that the twenty-third verse should be read in a parenthesis; and thus the law of marriage will be brought into immediate connexion with the formation of the woman, and her introduction to the man, which is only interrupted by the eager and passionate epithalamium of Adam[k].

Thus, says Gerhard in the recapitulation of his argument, we have seen how God consulted, as it were, concerning the formation of woman, and the institution of marriage; how he gave effect to his counsel and decree; how he formed the woman as it were with his own hands; how, having formed her, he conducted her to Adam in Paradise; how he himself united the first pair; how he blessed them when they were united; how he delivered the law of marriage: and the result of the argument is, that God was the author and primary cause of marriage[l].

The sentiments of the Jewish Church concerning

[h] See the Commentators in Poole's Synops.
[i] Matt. xix. 4, 5.
[k] Gerhard, s. 45.
[l] Ibid. s. 48.

the divine institution of marriage, are explicitly declared in the prayer of Tobias, on the night of his marriage: Blessed art thou, O God of our fathers, and blessed is thy holy and glorious name for ever: let the heavens bless thee, and all thy creatures: thou blessedst Adam and gavest him Eve his wife for an helper and stay: of them came mankind: thou hast said, It is not good that man should be alone; let us make unto him an aid like unto himself. And now, O Lord, I take not this my sister for lust, but uprightly, therefore mercifully ordain, that we may become aged together[m].

There is an obscure and indistinct assertion of the divine institution of marriage, and a secret allusion to the text of Moses, in a perplexed and intricate passage of the prophet Malachi, who, in reproving the foreign marriages and multiplied divorces which were common to the age, observes with indignation, The Lord hath been witness between thee and the wife of thy youth, against whom thou hast dealt treacherously; yet she is thy companion, and the wife of thy youth. And did he not make one? Yet had he the residue of the Spirit. And wherefore one? That he might seek a godly seed. Therefore take heed to your spirit, and let none deal treacherously against the wife of his youth[n]. The exposition which Lowth[o] considers the most probable of various interpretations is, that the prophet

[m] Tobit viii. 4—7.

[n] Malachi ii. 14, 15.

[o] Lowth in loc. See also the commentators in Poole's Synops. Abarbinel in Pocock's Commentary. The marginal note in the Bishops' Bible, ed. 1634. and in Annot. Tremellii et Junii.

puts the Jews in mind of the first institution of marriage in paradise, as Christ did afterwards upon a like occasion[p], and tells them that God made but one man at first, and made the woman out of him, when he could have created more women, if he had pleased: to instruct them, that this was the true pattern of marriage, ordained for true love and undivided affection, and best serving the chief end of matrimony, viz. the religious education of children. Other commentators agree in recognizing the allusion to the divine institution of marriage, and to the offensive nature of divorce considered as the violation of that institution.

It would be a very contracted and imperfect view of the evidence borne in the Jewish Scriptures to the divine institution of marriage, which should be restricted to the history of its primary institution. Allusions are frequently made to the violation of the law of marriage, as an offence against God. It is in this spirit, that Malachi[q] reproves the practice of divorce, and exhorts the people to beware of violating the intention and purpose of the divine institution. Adultery is also represented to be a sin against God, whose anger would not be provoked, but by the transgression of his own institutions. It is one of the chief motives which preserved the chastity of Joseph, that he could not sin against God[r]: and it was the aggravation of the complicated crime of David, that he sinned against the Lord, and despised the commandment of the Lord[s]. The chief

[p] Matt. xix. 5. [q] Malachi ii. 14, 15. [r] Gen. xxxix. 9.
[s] 2 Sam. xii. 9, 13.

offence of the adulteress is, that she disobeys the law of the Most High[t]: and the wise man is supposed to recognize the divine institution of marriage, when he describes the adulteress as forsaking the guide of her youth, and the covenant of her God[u]; that covenant, which is divine in respect of its primary institution and religious celebration, which is contracted under the authority of God, not without the intervention of his providence and the solemn invocation of his name. The Lord also interfered upon various occasions, and took upon himself the direct protection and vindication of his own institution[x]: and not only delivered generally a sentence of capital punishment upon the adulterer and the adulteress[y] who should be convicted, but interposed his special providence in the extraordinary operations of the waters of jealousy[z], suspending their power, or calling it into action, as was due to the innocence or guilt of the accuser and the accused. In a variety of precepts and prohibitions he also regulated the law of marriage, and purified it among his chosen people from the different pollutions which had been introduced into the practice of the heathen. It is unreasonable, it is not authorized by the sacred history, it is an unworthy conception of the providence of God, to suppose that there would have been this frequent revision, this jealous care, of the purity of a law which was not originally divine. The Jews,

[t] Ecclus. xxiii. 23.
[u] Prov. ii. 17. See Geier. in Poli Synops. in loc.
[x] Gen. xii. 17. xx. 18.
[y] Lev. xx. 10. Deut. xxii. 22.
[z] Numbers v. 11—31.

under the instruction of their inspired teachers, were sensible, not only in general of the divine institution of marriage, but of the particular interposition of the Divine Providence in the affairs of marriage. Whoso findeth a wife findeth a good thing, and obtaineth favour of the Lord[a]. House and riches are the inheritance of fathers, and a prudent wife is from the Lord[b]; or, according to the version of the Seventy, It is from the Lord that a wife is fitted, is conjoined, or betrothed, as by a parent to a husband: as Solomon describes the special favour and peculiar providence of God in marriage, in opposition to the ordinary distribution of worldly good. The patriarchs also acknowledged the same divine interposition in the arrangement of marriage, as it were by the mediation of angels. It was Abraham's instruction to his servant, that the Lord God of heaven should send his angel before him, and that he should take him a wife unto his son; and the same Eleazar in his prayer makes mention of the damsel, whom the Lord had appointed, or destined, for his servant[c]. The angel also advised Tobias, that Sara had been prepared for him from the beginning[d].

If there had been any defect in the evidence, or any difficulty in the interpretation, of the Old Testament concerning the divine institution of marriage, that difficulty would have been removed, and that defect supplied, by the clear and explicit manner in

[a] Prov. xviii. 23.

[b] Prov. xix. 14. See Biel. Lex. under ἁρμοζω. Ainsworth on Gen. ii. 22. Gerhard, sect. 48.

[c] Gen. xxiv. 7, 14.

[d] Tobit vi. 17.

which the doctrine is renewed and enforced in the New Testament. In refuting the perverse comments of the Jews concerning the lawfulness of divorce, our Lord refers them to the primary institution of marriage, as to a record which could not be contradicted: Have ye not read, that he who made them at the beginning, made them male and female; and said, For this cause shall a man leave his father and mother, and cleave unto his wife; and they twain shall be one flesh? He then adds his own irresistible inference, What therefore God hath joined together, let not man put asunder[e]. Nothing can be more decisive, than this reference to the primæval record and its divine authority, or more worthy to bind the faith and practice of Christians, than the comparison which is drawn between marriage as the institution of God, and divorce as the unlawful assumption of man. The antithesis, says a writer[f] by no means disposed to support an unauthenticated doctrine; the antithesis between God and man explains the reason of the interdict; other contracts of a merely civil nature may be contracted and dissolved by the mere consent of the parties; but marriage has in it something of a more sacred nature, and therefore, as if by the intervention of an authority not less than divine, it is celebrated in the Church, and can only be dissolved by death.

The presence of our Lord at the marriage in Cana

[e] Matt. xix. 4—6. Mark x. 6—9.

[f] Beza in Poole's Synops. in Mark x. 9. See also Grotius in Matt. xix. 6. Theodotion understands the word *man* of Moses, as if our Lord had meant, Mosis concessionem ordinationi divinæ nihil detrahere. Ibid.

of Galilee[g] is frequently alleged by the ancient writers in vindication of the dignity of marriage: and it is a just and unanswerable inference, that if there had been any thing impure in the celebration of the marriage feast, or any thing in the state of marriage not worthy of all honour, the offence would have been marked by the censure of our Lord; the marriage would not have been sanctified and honoured, adorned and beautified, with his presence; nor would his first miracle have been wrought for supplying the deficiencies of the nuptial entertainment.

The divine institution of marriage may also be inferred from the argument drawn by Saint Paul in favour of conjugal love and unity, from the unity and love of Christ to his Church: Husbands, love your wives, as Christ also loved the Church, and gave himself for it. . . . So ought men to love their wives as their own bodies: he that loveth his wife loveth himself, for no man ever yet hated his own flesh, but nourisheth and cherisheth it even as the Lord the Church; for we are members of his body, of his flesh, and of his bones. For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery; but I speak concerning Christ and his Church[h]. From this passage, the Romanists have collected the sacramental nature of marriage, not observing that Saint Paul expressly af-

[g] See Gerhard, sect. 28. who recites the authorities of Epiphanius, Hæres, l. ii. 67. Augustin in quæst. Vet. et Nov. Test. q. 127. In Johan. tract. 9. Bede in Johan. ii.

[h] Ephes. v. 25, 28—32.

firms, that the great mystery, or sacrament, as it is translated in the Vulgate, of which he speaks, relates not to the marriage of the man with the woman, but to the union of Christ with his Church. The Church of England holds the more scriptural language and doctrine, that God hath consecrated the state of matrimony to such an excellent mystery, that in it is signified and represented the spiritual marriage and unity between Christ and his Church. This unity, according to the Jews[i], was typified in the primitive institution of marriage: and as the woman was originally taken out of Adam, being bone taken out of his bone, and flesh taken out of his flesh[k], so Christians, in virtue of their spiritual incorporation into the Church of Christ, are members of his body, and in the power of that relation, and of the infused life and strength which they receive from their union with him, they are as bone taken out of his bone, and flesh taken out of his flesh. As Christ therefore for the sake of his Church left the glories of his Father's kingdom[l], so the man and the woman forsake the dearest relations of life, and are united in the indissoluble union of marriage. The primary law of marriage is elevated by this sacred application as a type of Christ and his Church, which would be both incomplete and

[i] See Grotius in Poole's Synops. on Eph. v. 32. and compare Pyle on the text, where he expresses a doubt of the antiquity of the tradition: but would the type have been admitted by the Jews *after* the coming of Christ and the allusion of the apostle?

[k] Μελη εσμεν του σωματος αυτου, εκ της σαρκος αυτου και εκ των οστεων αυτου. Cf. Gen. ii. 23. and 2 Sam. xix. 12.

[l] See Origen, Com. in Matt. tom. xiv. sect. 17.

unworthy of the dignity of the Son of God, if marriage itself was not of divine institution.

There is considerable difficulty in interpreting the words of the primary institution of marriage, as they are applied in the first Epistle to the Corinthians: Know ye not that your bodies are members of Christ? Shall I then take the members of Christ and make them the members of an harlot? God forbid! What, know ye not that he who is joined to an harlot is one body? for two, saith he, shall be one flesh. But he that is joined to the Lord is one spirit[m]. The objection which is inseparable from the ordinary interpretation of these words is, that the mere sexual intercourse, independent of the conjugal union, makes the man and the woman one flesh. This is certainly the tendency of the annotation of Whitby and of other commentators[n], from whom it might be deemed presumptuous to differ, if any authority could justify the opinion, that Saint Paul could in any case, and especially in an argument against fornication, as it is commonly understood, recite a sacred authority in favour of an intercourse, which, however it may in fact unite the sexes, cannot unite them by right or authority, or in conformity with the divine institution to which it is directly opposed[o]. It is necessary therefore to seek another interpretation; and a solution of the difficulty will be found, either in the equivocal and undefined meaning of the words *one body*, or in the

[m] 1 Cor. vi. 15—17.

[n] See Whitby and Poole's Synopsis in loc.

[o] Lucas Brugensis in Poole's Synopsis on Matt. xix. 5.

peculiar and unusual sense of the word πορνη, translated *harlot*.

It will not be denied, that the apostle alludes to the words of Moses, if he does not directly recite them: and in the management of his argument concerning things lawful and things expedient, he anticipates in the form of a dialogue the objections which the Corinthians might allege against his doctrine. Having examined the case of food, he proceeds to the more difficult case, which he calls fornication, and it becomes his principal proposition, that the body is not for fornication, but the Lord, which he enforces upon the Corinthians, concealing the strongest affirmation in the form of a question: Know ye not that your bodies are the members of Christ? This you cannot deny, and I therefore put the question, Shall I then take the body, which, by virtue of its acknowledged incorporation into the Church, is one of the members of Christ, and make his members the members of an harlot? We shall both exclaim against such profanation and say, God forbid! You will object, that the members of Christ are not thus made the members of an harlot: I ask again, therefore, Do ye not know, that he who is joined to an harlot is one body? for two, saith he, shall be one flesh: but he that is joined to the Lord is one spirit. The authority in question is recited between the two assertions, that he who is joined to an harlot is one body, and he that is joined to the Lord is one spirit. And the first question which arises concerns the sense in which the apostle uses the words *one body*. If he means, that he who unites himself with an harlot is one body *with her*,

as he who is joined to the Lord is one spirit *with him*, and if in this parallelism the word *harlot* is to be understood in its ordinary acceptation, then the words in the parenthesis must be interpreted of the meretricious union, and bear the awful sense which is imputed to them. But if, as in other texts[p], the one body means, the one body of Christ, or his Church, the text recited is no more than an authoritative reiteration of the preceding assertion; and the whole passage, being appropriated to the mystical union of Christ with his Church, teaches, that fornication, in whatever sense the word be interpreted, does make the members of Christ the members of an harlot. The words may thus be paraphrased: He who is joined to an harlot, sins in the prostitution of that body in which he is incorporated with Christ; for Christ and his Church are one, in virtue of which he is also one Spirit with the Lord. This interpretation, by which the passage is recovered from the degraded sense which the commentators have fastened upon it, and elevated to the expression of a sacred mystery, has not only the authority of the ancient expositors, but the advantage of agreeing with the context. The body, which is not for fornication, but the Lord, is not the human body, but the mystical body of the Church, and in the succeeding clause, a man is required to flee fornication, because every other sin that a man doeth is without the body, but he that committeth forni-

[p] Rom. xii. 4, 5. 1 Cor. x. 17. Col. iii. 15. 1 Cor. xii. 13. Eph. ii. 16. iv. 4. In the three last texts there is mention of one body and one spirit.

cation sinneth against his own body, against that proper body of which he is the member, and Christ is the head[q].

The appropriation of the word *one body* to the body of the Church, is not inconsistent with the interpretation of the word translated *harlot*, in a sense remote indeed from ordinary apprehension, and neglected by modern commentators, but familiar to the ancient expositors, and agreeable to the use of the Hellenistic writers, who understand by πορνεια, or fornication[r], not whoredom, commonly so called, but alienation, or apostacy, and especially alienation by marriage of the faithful with the unbelieving. In the first sense the apostle maintains, that the body or church of Christ was not designed for apostacy, but for devotion and faithfulness to the Lord[s]: in the second sense he adverts to the forbidden marriages of the believer with the unbeliever. Shall I take the members of Christ, and make them by marriage the members of an unbelieving woman? God forbid! The Corinthians might object, that, as such marriages were unlawful, they could not have the effect supposed: and the apostle in reply to the objection would argue, Shall I not do this, if I marry an unbelieving woman; for he who is joined to a woman in marriage is one body with her, according to the authority of him who hath instituted

[q] Χριστος κεφαλη εστι της εκκλησιας ὡς εινει ἑν σωμα Χριστου και την εκκλησιαν. Origen, c. Celsum, l. vi. sect. 79. See also Clem. Rom. Ep. ad Cor. i. c. 46. Clem. Alex. Strom. l. vii. c. 14. and other authorities on the text, recited in Appendix, No. I.

[r] See Appendix, No. I.

[s] Clem. Alex. ubi supra.

marriage, and who hath said, The two shall be one flesh. This respects my personal union with the unbelieving wife, and my becoming one body with her; and I am already by a spiritual union the member of Christ; for he that is joined to the Lord is one spirit. Flee therefore such forbidden marriage. Every other sin that a man commits is without the body, and does not defile the Church, but he that marrieth an unbelieving wife sins against that sacred body. This is called by Tertullian a violation of the temple of God, a confusion of the members of Christ with the members of a forbidden wife: and by Cyprian, a joining of the bond of marriage with the unbelieving, a prostitution of the members of Christ to the heathen; and he presses the text as an authority for the proposition, that marriage should not be contracted with the heathen[t]. This exposition, while it gives even to a forbidden marriage the authority of the divine institution, rests not upon any tradition, however primitive, but is demanded by the context, which cannot otherwise be explained. If *fornication* and *the body* both bear their ordinary sense, it is difficult to conceive upon what ground it is said of fornication, more than of any other sensual indulgence, that the body is not made for fornication; that every other sin besides fornication is without the body; and that he that committeth fornication sinneth against his own body: even if the *body* be understood of the Church, and fornication retains its ordinary sense, still it may be

[t] Tert. ad Ux. l. ii. s. 3. Cyprian Lib. de Lapsis, Lib. Test. l. iii. s. 62. See Appendix, No. I.

asked, how fornication, more than any other sin, brings scandal upon the Church. But by the proposed revival of the ancient interpretation the chief difficulties are removed. The Church is not made for apostacy: and every disciple, by making an unbeliever one with him in marriage, offends against the Church, of which he is a member, by bringing the unbeliever with whom he is matrimonially incorporated into communion with Christ, with whom he is also united in a spiritual relation. The order in which the apostle treats first of food offered to idols, and then of fornication, interpreted of some specific act of idolatry, is not unusual with the sacred writers in other passages[u]: and there is a striking correspondence between the text thus interpreted and the parallel passage[x], in which the apostle reverts to the same subject: and the making the members of Christ the members of an alien coincides with being unequally yoked together with unbelievers; the being joined to an alien in one body, and to the Lord in one spirit, with the concord between Christ and Belial, and the portion possessed in common between him that believeth and the unbeliever; the knowledge that the body is the temple of the Holy Ghost, with the agreement of the temple of God with idols; and the conclusion of glorifying God in the body and in the spirit, with the purification of all filthiness of the flesh and spirit, perfecting holiness in the fear of God. The coin-

[u] Rev. ii. 14, 20.

[x] 2 Cor. vi. 14—18. vii. 1. See Leslie's Sermon concerning marriages in different communions, prosecuted by Dodwell, sect. 22—29.

cidence between the two passages is such as the most inattentive reader can hardly overlook: the context, the order of the apostle's discourse, and the parallel passage, all agree in demanding the exposition, which is justified by the primitive and apostolical use of the words in question: and whether the text of Moses be applied, as in the Epistle to the Ephesians, to the mystical union of Christ with his Church, or, as the immediate context requires, to the actual marriage of the man with the woman, it is satisfactory to know, that the sacred text may be vindicated from a very unworthy application, and may be made to bear a clear and decisive testimony to the divine institution of marriage.

To the authority of the Scriptures in favour of the divine institution of marriage, should be added some of the testimonies of the Church, received in uninterrupted tradition from the apostles. In the first century the apostolical father Ignatius thus instructs the Church of Antioch: Let husbands love their wives, remembering that at the creation one woman was given to one man, not many to one man: let wives honour their husbands as their own flesh, nor let them venture to call them familiarly and by name, or without acknowledgment of their preeminence: let them also be chaste, considering those only to be their consorts, to whom they have been united according to the will or institution of God[y].

In the second century Clemens of Alexandria

[y] Ep. ad Antiochen, sect. 9. κατα γνωμην Θεου, q. d. secundum ordinationem Dei. Vet. ver. apud Coteler. v. ii. p. 152. see not. in loc.

calls marriage the appointment or ordinance of God[z]. Theophilus, with a direct reference to the Mosaic history, affirms, that Adam knew Eve his wife, whom God made out of his side for his wife. . . . He made her, *and said*, The two shall be one flesh; and the same thing is shewn to be fulfilled in ourselves[a]. Tertullian also undertook the defence of matrimony, when it was accused by an enemy under the name of debauchery to the prejudice of the Creator, who gave his blessing to marriage according to its honour for the increase of mankind, and generally for good and perfect uses. . . . It is not the institution, but the abuse, which requires reproof, according to the sentence of him who instituted it, who both said, Increase and multiply; and, Thou shalt not commit adultery. . . . Although bounds must be set to marriage, which among us are defended by spiritual reasons under the authority of the Paraclete, prescribing one marriage to the faithful, it must be for him who gave the liberty to fix the limitation . . . the end and the beginning belong to the same power. . . . O heretical deity of Marcion, you would be grateful if you had counteracted the ordinance of the Creator, in uniting man and woman[b].

In the third century Origen expressly ascribes the matrimonial union to the interposition and ordinance of God: It is God who joineth the two together

[z] Strom. l. iii. s. 12.

[a] Ad Autolyc. l. ii. s. 28. If part of the passage be read in a parenthesis, the primary law of marriage will be referred immediately to God, and uninterruptedly follow the creation of the woman.

[b] Adv. Marcion, l. i. s. 29.

into one, so that they are no more two, by whom the wife is betrothed to her husband: and since it is God who joins them together, therefore there is a gracious gift to them that are joined together by God; of which Paul being sensible, said, that in the same manner as pure celibacy is a gift, so is marriage according to the word of God a gift: and they who are joined together by God, meditate and practise the rule; Husbands, love your wives, even as Christ loved the Church. The Saviour therefore saith, What God hath joined together let not man put asunder[c]. The author of the book De Singularitate Clericorum[d], annexed to the works of Cyprian, also asserts, that our Lord foresaw the heretics who should take away marriage, and labour in opposition to the principle of nature, and to the Gospel, to separate what the Lord hath joined. In the Constitutions, which bear the name of Apostolical, and which are ascribed to the third century, it is said, Ye should know, that single marriages which are according to law, are just, being according to the will of God: for God at the creation gave one woman to one man, for the two shall be one flesh. Among other duties said to be prescribed by the apostles, is lawful marriage; for such marriage is blameless, because a woman is betrothed to a husband by the Lord: and the Lord says, He that made them at the beginning, &c. for the woman is the partner of life, united in one body out of two by God; and he who divides this unity again into two, is the enemy of the creation of God, and the rival of

[c] Com. in Matt. tom. xiv. s. 16. [d] S. 25.

his providence[e]. In the Apostolical Canons annexed to the Apostolical Constitutions it is ordained, If any bishop, priest, or deacon, or any other of the sacerdotal body, abstain from marriage, or the use of flesh or wine, not from discipline but antipathy, forgetting that all things are very good, and that God made man male and female, and blasphemously accuse the creation of God, let him amend, or be deposed and excommunicated. The same rule applies to a laic[f].

In the fourth century, Augustine argues, The intention of our Lord in going to the marriage to which he was invited, was to shew that he was the author of marriage: for there are some, of whom the apostle says, Forbidding to marry, and saying that marriage is evil, and the invention of the devil; whereas the Lord says in the Gospel, What the Lord hath joined together, let not man put asunder. And it is known to all who are instructed in the catholic faith, that God made marriage, and that, as the union is of God, divorce is of the devil[g].

In the sixth century, Fulgentius represents marriage to be not of the contagion of sin, but of the institution of God[h]. Isidore[i] also, in his chapter Of married persons, not only recites the history of the institution of marriage, but speaks of the marriage of one man to one woman, after the example of the first union, which was divinely made: and he

[e] L. iii. c. 2. l. vi. c. 14.
[f] Canon Apostol. (or Const. Apost. l. viii.) c. 43.
[g] In Johan. tract. 9. apud Gerhard.
[h] De Statu Viduali, Ep. ii. Ibid.
[i] De Off. Div. l. ii. c. 19.

deduces the sacerdotal benediction from what was done by God in the first conjunction of man.

In the eleventh century, Theophylact says, God from the beginning took especial care of marriage; for he united Adam to his sister; yea, rather to his daughter; or what shall I say? to his own flesh. Afterwards, when men were multiplied, he extended marriage more widely, that love might not be confined to kindred only[k].

At the time of the Reformation the sacramental character of marriage was not denied more strenuously than the doctrine of its divine institution was maintained. Calvin wrote, "of Matrimonie, which as all men confesse to be ordained of God, so no man, untill the time of Gregorie, ever saw that it was given for a sacrament. It is a good and holy ordinance of God[l]." Beza[m] affirms, that God professes himself the author of marriage, and again and again admits the conciliation of marriage under his authority, without which he denies its validity. The contemporary confessions breathe the same doctrine: the Helvetic declaring marriage to be an useful institution of God, and to be divinely instituted for all men who are fit and not called to another method of life[n]: the Augustan referring to the evangelical injunction of compliance with marriage and the ordinance of God, who hath thus constituted the nature of men, that there should be

[k] In. v. Eph. apud Gerhard. [l] Inst. l. iv. c. 19. s. 34. [m] De Repudiis. [n] Sylloge Confessionum, p. 76, 112. [o] Ibid. p. 181.

a perpetual society of the husband and the wife[o]: the Saxon confession defining marriage to be the lawful and indissoluble union of one man and one woman, to be observed according to the commandment of God, who willed this method of association for the human race. God in the beginning gave sanction to this order, in the words, The two shall be one: namely, one man and one woman, inseparably united: and this primary law was again sanctioned by Christ[p]. In the Apology for the Confession of Wirtemberg it was also affirmed, that marriage is a holy kind of life, divinely instituted and recommended[q].

Even in Scotland, where the practice rests on the basis of a merely civil contract, the doctrine of the divine institution is upheld by her most distinguished lawyers, by whom marriage is regarded as antecedent to all civil society whatever, and founded in the divine institution. "The first obligations," says Lord Stair, "put upon man by God, were the conjugal obligations, which arose from the institution of marriage. Marriage itself, and the obligations thence arising, are *jure divino*." Lord Bankton, in his observations on the rule of law, *nuptias non concubitus sed consensus facit*, says, "The law before us being from Ulpian, a Gentile lawyer, who did not own marriage to be a divine contract, must hold more strongly in Christian states, who regard it as such; and particularly with us marriage is esteemed a divine contract." And Mr. Erskine observes, that "the character of perpetuity

[p] Sylloge Confessionum, p. 258. [q] Gerhard, s. 14.

seems to have been impressed on marriage by God himself in its first institution, when he declared the two common parents of all mankind to form one flesh; which was afterwards improved by our Saviour's injunction, that no man should put asunder those whom God had joined[r]."

The special care which has been manifested in the universal prevalence of marriage, affords another presumption in favour of its divine institution, and it is a just argument, that the state which has in all ages been preserved by the care of his providence, must have had its origination with God. In the beginning, and with an express view to the conjugal union, God made a male and a female, and ordained that a man should cleave unto his woman[s], and the remarkable equality which has been seen to prevail in the birth of the sexes, with a small preponderance in favour of men, in proportion to their more hazardous employments, and other adventitious causes which shorten the life of man, is utterly irreconcileable with the laws of chance, and can only be ascribed to the immediate interposition and control of the divine Providence. This general equality in the birth of the sexes is sufficient to justify the several inferences, that one man ought to have but one wife: that every woman without polygamy may be married; and that the Christian religion, in prohibiting polygamy, is more agreeable to the law of nature, that is, to the primary law of marriage, than Mahometanism and other forms of

[r] See Fergusson's Reports of Recent Decisions in the Consistorial Court of Scotland, p. 92, 340.

[s] Gen. i. 27. Ainsworth in loc.

religion under which polygamy is allowed[t]. The succession of seasons hardly bears a stronger testimony to the preserving power of the Creator, than is borne in the perpetual proportion in the numbers of men and women to the divine institution of marriage.

One of the most ancient writers of the Church, in undertaking the defence of marriage from the various objections which were brought against it, pursues a line of argument which justifies the conclusion, that matrimony is of divine institution. He maintains, that nature has formed man with a disposition to marriage, as is clear from the structure of the body of the man and the woman; and, with an allusion probably to the argument of Plato, who held that it was the excellence of marriage to raise up a succession of servants unto God, he proceeds to argue that the man who is childless is destitute of the perfection of his nature, in having no substitute for himself to succeed him in his country, and that he is the most perfect, who sees his children's children descending from him. Hence he infers the necessity of marriage, for the sake of one's country, of the succession of issue, and the consummation of the peopling of the world. He contends that the diseases and infirmities of the body also prove the necessity of marriage, since the affection of a wife, and the earnestness of her care, exceed the assiduities of other friends and domestics, and she is indeed, according to the Scripture, a necessary auxi-

[t] See Encyclopædia Brit. Art. Marriage, where these inferences are sustained by appropriate calculations.

liary. He then meets the objection of some who would detract from marriage, and shews the beneficial influence of marriage upon those who are advanced in years, in affording the care of a wife, and in raising from her children for the support of old age[u]. Are these energies of marriage, extending from the consummation of the world to the decrepitude of individuals, and supplying the wants of each and of all, the effects of divine or human wisdom? And is it no proof of the providence which designed and watches over the ends of marriage, that, under all its cares and anxieties, all its labours and privations, all its peculiar pains and perils, there is ordinarily and actually given to wedded life a longer duration than to a life of celibacy, and that the life of married women especially exceeds that of single women? This is not the result of human policy; it is the blessing of God following his own institution, the secret evidence of that power which is in continual operation for the benefit of mankind.

The perpetuation and universality of the conjugal union, continuing with little deviation from its original law, bear the same testimony to its divine origination and the providential care with which it has been preserved. Marriage was instituted in the person of our first parents in the state of innocence; and after the fall God repeated and confirmed his ordinance, when he spake of the seed of the woman, and of the sorrow and pain of childbirth, adding the penalty of sin, but not rescinding the primary institution of his mercy, for the immediate consolation

[u] Cl. Alex. Strom. l. ii. s. 23.

of the parties, and for the perpetual propagation of mankind, in virtue of which Adam calls Eve the mother of all living[x]. So again, after the flood, the Lord God reiterated the precept and the blessing addressed to the first pair, renewing the primary law to the sons of Noah, whose marriages had been recognized by the preservation of them and their wives in the ark: Be fruitful and multiply and replenish the earth: and the fear of you, and the dread of you, shall be upon every beast of the field, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea; into your hand are they delivered. . . . And you, be fruitful and multiply; bring forth abundantly in the earth, and multiply therein[y]. From the issuing of this benedictory commandment, there has been in all ages, and in all countries, and under all dispensations of religion, such uninterrupted respect to marriage as cannot be accounted for without the recognition of a divine institution, and of a corresponding impression on the hearts of men in conformity with the will and ordinance of God. In marriage there is nothing of the partial, the transitory, the fluctuating, and perishable nature of human institutions; the rules of dower and of settlement, and the forms of contracting marriage, which are confessedly of human invention, have all been subject to change; but marriage, both in its law and in its end and purpose, has ever remained the same permanent union of a man with a woman, for mutual consolation and

[x] Gen. iii. 16—20. Gerhard, sect. 48.

[y] Gen. ix. 1, 2, 7. Gerhard, sect. 48. See Origen, Com. in Gen. vi. 19.

the nurture of common children. The sentiments of the ancient Jews have been collected from the Old Testament, and their descendants, so far from disparaging or being offended at the Christian doctrine of a divine institution, do not scruple to call the rites of marriage by the name of conjugal sanctification[z]. The best and wisest of the heathens derived marriage from the institution of nature, not only for the most pleasant, but the most useful society of life[a]: they ascribed to it a divine and sacred character, speaking of it as holy marriage[b], a holy conjunction[c]; and they called it by a name which implies perfection, or sacred initiation[d], placing it under the superintendence of the supreme divinities, reserving the administration of the law of marriage to the Pontifices[e], and not contracting it without religious offices, without taking the auspices, or without the invocation of a polytheism, multiplied beyond all conception. Polygamy, wherever it has prevailed, whether under the patriarchs, or under the law of Mohammed, is confessedly the corruption of an earlier and purer institution, and among the

[z] Hooker, Eccl. Pol. B. v. s. 73.

[a] Columella, l. xii. c. 1. apud Hotman.

[b] Dionys. Ant. l. ii. Hooker.

[c] Plutarch apud Dodwell.

[d] "Τελος and γαμος are terms of the same signification, whence γημαι, to marry, is termed τελειωθηναι, to be made perfect. Married persons are called τελειοι, and are said to be εν βιῳ τελειῳ. The same epithet is commonly given to the gods that had the care of marriage." Potter's Antiq. b. iv. c. 11.

[e] Jus matrimoniorum non mere civile, sed magna ex parte pontificium erat et sanctum habebatur. Fr. Hotman de Sponsalibus, c. 2.

Druses, who are not otherwise scrupulous in respect of marriage, the licence is but seldom permitted. Among tribes the most remote from the practice of civilized life, among the Esquimaux of the North, and the wandering hordes of the Western regions of America, from Tartary to Caffraria, there is, with less modification than might be conceived, a bond of marriage, the virtue and the honour, the blessing and the consolation, of savage as of polished life; the protection and instruction of infancy, the aid of manhood, and the support of feebleness and decrepitude. All the forms of human association have varied, and in the revolution of ages have been superseded and renewed; but marriage has never been unknown: it has had the sanction of such universal practice as proves its conformity with the very constitution of human nature, and the best and kindliest affections of the heart, and leaves the inference of its origination with the Author and Creator of mankind. "That the holy state of matrimony was instituted by God," says Wheatly, "is evident from the two first chapters of the Bible; whence it comes to pass, that, amongst all the descendants from our first parents, the numerous inhabitants of the different nations of the world, there has been some religious way of entering into this state, in consequence and testimony of the divine institution[f]."

If there be any force or value in the authorities or the arguments which have been alleged in favour of the divine institution of marriage, it will be hardly necessary to vindicate the doctrine from the imputa-

[f] Illustration of the Common Prayer, c. x. Introduction.

tion of popery, which has been brought against it in the following exhibition in parallel columns of the rituals of England and of Rome.

"We have described the English marriage ceremony as a *popish* institution, and protestants should know, that the service is derived in great measure from the popish mass-book and ritual. . . . The catholics, it is true, hold marriage to be a *sacrament*, but the reformed Church appear to us, in substance and in fact, to avow the same sentiment: this will sufficiently appear by comparing the following extracts from the marriage service of the two Churches.

Catholic.	*Protestant.*
'Matrimony is a holy state, originally instituted by Almighty God between our first parents, (Gen. ii.) ratified and confirmed by the Son of God in the New Testament, (Matt. xix. 4, 5, 6.) honoured by his first miracle, (John ii.) and raised by him to the dignity of a *sacrament*, as a most holy sign and *mysterious* representation of the indissoluble union of Christ and his Church.'	'Matrimony, which is an honourable estate instituted of God in the time of man's innocency, signifying unto us the *mystical* union that is betwixt Christ and his Church.' And again: 'O God, who hast consecrated the state of matrimony to such an *excellent mystery*, that in it is signified and represented the spiritual marriage and unity betwixt Christ and his Church.'[c]"

It is obvious to remark, that in this exhibition the doctrine of the Church of Rome is substantiated by reference to the Scriptures, except in that part of it which treats of the sacramental nature of marriage,

[c] Freethinking Christians' Quarterly Register, No. III. p. 269.

for which no authority is produced, and which is known to be founded in a misrepresentation of the meaning, and an ambiguous translation of the words, of the apostle. Let similar references be annexed to the words of the English ritual, and the scriptural authority of its doctrine will immediately be seen: or let a third column of scriptural authorities be inserted between the recited formularies; the Catholic, the Scriptural, and the English doctrine will appear in the following order.

1. *Catholic.*

"Matrimony is a holy state originally instituted by Almighty God between our first parents, (Gen. ii.) ratified and confirmed by the Son of God in the New Testament, (Matt. xix. 4, 5, 6.) honoured by his first miracle, (John ii.) and raised by him to the dignity of a sacrament, as a most holy sign and mysterious representation of the indissoluble union of Christ and his Church."

2. *Scriptural.*

Marriage is honourable in all. Heb. xiii. 4.

He who made them at the beginning, made them male and female, and said, For this cause shall a man leave father and mother, and shall cleave to his wife, and they twain shall be one flesh: wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder. Matt. xix. 4, 5, 6. Mark x. 6—9. Gen. ii. 22, 23, 24.

We are members of his body, of his flesh, and of

his bones. For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery; but I speak concerning Christ and his Church. Ephes. v. 30, 31, 32.

3. *Church of England.*

"Matrimony is an honourable estate, (Heb. xiii. 4.) instituted by God (Matt. xix. 4, 5, 6, &c.) in the time of man's innocence, (Gen. ii. 20, 24.) signifying unto us the mystical union that is betwixt Christ and his Church; (Eph. v. 32.) which holy estate Christ adorned and beautified with his presence and first miracle that he wrought in Cana of Galilee, (John ii.) and is commended of Saint Paul to be honourable among all men. (Heb. xiii. 4.) God has consecrated the state of matrimony to such an excellent mystery, that in it is signified and represented the spiritual marriage and unity betwixt Christ and his Church." (Eph. v. 31, 32.)

The result of this collation will be very different from the intention of the objector, proving, as far as the two Churches agree, that the Church of Rome is scriptural, not that the Church of England is popish. It is however further objected, that the two Churches agree "in attaching to marriage the mystical notions which were introduced in the darker ages; the Catholic ritual calling marriage 'a *sacrament*,' 'a *great sacrament*:' the Protestant ritual denominating it an *excellent mystery*. A *sacrament* then being a *mystery*, the two Churches meet

in perfect concord on this point, the one having its *great*, the other its *excellent*, *mystery*[h]."

If accurate distinction was not incompatible with rapid ratiocination, it might have been observed, that the mystical notion of the sacramental nature of marriage was introduced in the darker ages, but the doctrine that marriage represents the union of Christ with his Church has the high sanction of St. Paul, and the continued and uninterrupted tradition of the Church from the apostolic age, and was known to the writers of the Latin Church under the name of Sacramentum[i], before the origin of the papal ascendancy, and many centuries before the invention of the seven sacraments. The Churches of England and Rome therefore do not agree in the mystical notions which they attach to marriage, the one affirming marriage itself to be a sacrament, the other, in her Articles, expressly denying that marriage is a sacrament, and in her ritual, declaring it to be the sign of a mystery of a different kind. In the Homily against Swearing mention is indeed made of the sacrament[k] of matrimony: the old lan-

[h] Freethinking Christians' Quarterly Register, No. III. p. 269.

[i] So Paulinus, in the fourth century, says,

> Grande Sacramentum, quo nubit Eclesia Christo:
> Hic vos nectat amor, quo stringit Eclesia Christum.

Isidore, in the sixth century, uses the word for ordinary marriage, of which he infers the indissolubility from the union of Christ with his Church. Div. Off. l. ii. c. 19. And still the proper sacrament of marriage was unknown.

[k] The Apology for the confession of Wirtemberg, an unsuspected authority, uses the same language: "Quia conjugium est sanctum vitæ genus, divinitus institutum et commendatum, libenter ei tribuimus nomen sacramenti." Gerhard, sect. 14.

guage was retained, while the doctrine was renounced in the Articles and in the Catechism. Again: as a Greek may be rendered by a Latin word, a sacrament may be equivalent to a mystery, but yet the notion of a sacrament in the Church of Rome is so entirely at variance with the notion of a mystery in the Church of England, that it is the most childish equivocation to affirm the perfect concord of the two Churches, because "the one has its great sacrament, the other its excellent mystery." Such is the magical influence of names upon weak and uninstructed minds, that to some men it is a sufficient disparagement of truth to call it popery, while others are disposed to embrace an error, if it bears but the name of catholic. The Christian who thinks, who thinks for himself freely, independently, and with all the energy of a pure and unsophisticated mind, will not be deluded by the jingle of a name: he will examine the authority and authenticity of the religious doctrine which he professes to receive; he will ascertain by its conformity with the Scriptures the distinction between truth and error; he will entertain a manly aversion from the apostacy of superstition and fanatical credulity, and a not less manly aversion from the apostacy of infidelity, of an unreasonable, ignorant, and presuming scepticism, which mistakes objections for arguments, and innovation for truth. The religious enquirer knows that the doctrine of the divine institution of marriage is not a doctrine of Rome, but, in the best and fullest sense of the word, a catholic doctrine, a doctrine of the universal Church. Founded in the scriptures of both the Testaments, it is held by Jews, and it is held by Christians; it

is held by Romanists, and it is held by the most distinguished advocates of Protestant truth, of whom it may be sufficient to name, Calvin, Beza, Grotius, Gerhard, and Bishop Jewel, whose name is immortalized in the Apology of the Church of England against the assumptions of the Church of Rome.

It will probably be objected, that, in the contemplation of the law of England, marriage is a civil contract; and it will be readily admitted, that the law, as explained by its luminous commentator, does contemplate the civil contract of marriage, principally, but not merely, or exclusively, or without such restrictions as are sufficient to sanction the doctrine of the divine institution.

"Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts, which act *pro salute animæ*. And taking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract in the proper forms and solemnities required by law[1]."

There is no just objection to this state or statement of the law, if it be understood with the limita-

[1] 1 Bl. Com. c. 15.

tions which are admitted and required. If by civil contract be understood no more than the mutual agreement of the parties, such an agreement is an indispensable part of the divine institution, of which the parties cannot avail themselves without it. Since the period of the first marriage, of which the terms were dictated from above, the civil contract has been engrafted upon the divine institution, and it is only requisite that the conditions of the one shall correspond with the conditions of the other, securing the permanent union of one man with one woman, in all cases not forbidden by the law of God. The freedom of marriage is secured by statute (32 Hen. VIII. c. 38.) in all cases not contrary to God's law, thus restricting the ordinance of man by the ordinance of God; and all incestuous marriages are, during the life of the parties, voidable in the ecclesiastical courts. The forms and solemnities required by law are a security for the religious celebration of marriage, by a ritual which asserts the divine institution, and which prescribes conditions in conformity with that institution; and with the only exception of the marriages of Jews and Quakers, all marriages which are otherwise solemnized in England are invalid. The doctrine of a merely civil contract of marriage is further superseded by the admission of the concurrent jurisdiction of the spiritual and temporal courts, by the reservation to the former of the right of trying the validity of marriage, and by the power which the ecclesiastical courts possessed before the passing of the Marriage Act, and both before and after the Reformation, of compelling the celebration in *facie ecclesiæ* of marriages

entered into *per verba de præsenti*, i. e. by civil contract, which are declared to be in themselves not sufficient to set aside a subsequent marriage, solemnized in the face of the Church[m]. The Marriage Act, which, under pretence of some informality or defect in the mode of publishing banns or obtaining licence, voided the marriage solemnized in the face of the Church, was an anomalous innovation on the general policy of the English law of marriage, an extraordinary assumption of the power of temporal law; at once rescinding the civil contract, and counteracting the divine institution of marriage, limiting the power and the right of persons able and willing to contract, and actually contracting in all the forms required by law, except the arbitrary provisions of a statute, which inflicted the same irremediable penalties on those who ignorantly and those who deliberately transgressed its enactments.

There is a singular want of precision in the views which Paley has exhibited of the nature of the contract of marriage: "Whether it hath grown out of

[m] 32 Henry VIII. c. 38. entitled, "An Act for marriages to stand, notwithstanding precontracts," and providing that "all marriages, being contract and solemnized in the face of the Church, and consummate with bodily knowledge or fruit of children or child being had therein between the parties so married, shall be, by authority of this present Parliament aforesaid, deemed, judged, and taken, to be lawful, good, just, and indissoluble, notwithstanding any precontract." In the preamble it is affirmed of marriages voidable by reason of precontract, that "marriages have been brought into such uncertainty thereby, that no marriage could be so surely knit and bounden, but it should lie in either of the parties' power and arbiter, casting away the fear of God by means and compasses to prove a precontract," &c.

some tradition of the divine appointment of marriage in the persons of our first parents, or merely from a design to impress the obligation of the marriage contract with a solemnity suited to its importance, the marriage rite, in almost all countries of the world, has been made a religious ceremony, although marriage, in its own nature, and abstracted from the rules and declarations which the Jewish and Christian Scriptures deliver concerning it, be properly a civil contract and nothing more[n]."

If this had been a correct statement of the doctrine of the law of England, it would nevertheless have been extraordinary that such a statement, unaccompanied with any qualifications, should have fallen from the pen of an English theologian, arguing upon the office of matrimony, and upon the state of "marriage, as it is established in this country." The plain drift of the statement is to account for the religious celebration of marriage, which in its own nature is affirmed to be, properly, a civil contract. For this purpose the writer assumes the divine appointment or institution of marriage, and supposes that the general tradition concerning that appointment has contributed to render the marriage rite a religious ceremony. He appears at the same time to recognize some peculiarity in the rules and declarations of the Scriptures concerning it, which gives to marriage another character than that which it possesses abstractedly and in its own nature, in which it is properly a civil contract and nothing more. But is it possible, in a Christian country,

[n] Principles of Moral and Polit. Philos. b. iii. c. 8.

to take this abstract view of the nature of marriage, and to throw out of the consideration all which the Scriptures have taught concerning it, and the effect which common tradition and the impress of the divine institution have made upon the opinion and practice of mankind? The divine appointment of marriage, in the person of our first parents, is a fact which cannot be disputed. It is equally certain that marriage was contemplated in the divine mind when there was but one human being upon the earth, and a civil contract or mutual agreement of parties was impossible: and if there be truth in the comment of our Lord, the rule of marriage was delivered by the Deity before the woman had spoken. Marriage, therefore, in its primary origin, has no nature of its own, which can be abstracted from the rules and declarations which the Scriptures deliver concerning it: and it is incompatible with the truth of the sacred history to admit that marriage is "a civil contract and nothing more." A civil contract implies the consent of two persons; the intention of marriage was conceived when there was but one, and its original and perpetual law was prescribed before man had any communication but with his Maker. The mutual society, help, and comfort, which is the great end of marriage, was devised, because it seemed not good unto God that man should be alone; and it was therefore resolved, not that man in the first instance should contract an associate to himself, which, under the existing circumstances, was impossible, but that the Lord should make an help meet for him, and should present her unto the man, upon such terms that a civil contract or mutual con-

sent should be engrafted as the case permitted and required upon the divine institution, and that in all succeeding ages a man should be willing for this cause to leave his father and mother, and to cleave unto his wife, and they two should become one flesh.

There is another inaccurate statement, which is probably ascribed to higher authority than it deserves, and in which it is professed, that "before man left his woods marriage was accidental; in other words, the intercourse of the sexes was chiefly regulated by laws of instinct. Society changed the condition of man, and marriage necessarily became a civil contract. The progress of the social state, as it led to important moral reforms, was to beget a religious institution, and now the marriage contract is rendered sacred by a vow, taken as it were in the presence of God at the altar[n]."

No one will be more ready to admit than the eminent lawyer to whom these sentiments are ascribed, that not only when man left his woods, but before he entered them, there was a bond of marriage, first known in paradise, existing at the deluge, confirmed and ratified when the sons of Noah left the ark. The laws of human instinct, in respect of marriage, were not a brutal passion, leading to promiscuous or casual intercourse, but a divine impulse directed to a permanent union for the care of a common offspring. There never was a state of society, in which marriage could be accidental, in

[n] Speech of Sir W. Scott, on the Adultery Bill, Commons, May 30, 1800. Woodfall's Parl. Reports, vol. xxiii. p. 142.

which a mutual agreement or civil contract between the man and the woman was not also practicable. The violation or the forcible abduction of women is not the practice of the wilderness: the most untutored tribes have their laws of marriage. The laws of society, which alone could change the condition of mankind, and are said to have produced a moral reform, may have altered, but they could not originate, the civil contract, for marriage, more or less perfect in its kind, is found in the desert which civilized man never trod, as well as in the city, which is governed by his laws. The progress of the social state, unaided by the light of religion, has tended not to beget the "religious institution," but to corrupt the simplicity of the divine ordinance of marriage, which requires the permanent union of one man with one woman, by the introduction of polygamy and arbitrary divorces; and whatever forms of law it may have added to the vow of marriage, the vow itself is of primordial origin and universal right. The state of man in his native woods, is a state unknown to real history, the fiction of the orator and the poet, which, as suits their purpose, they make the Pandemonium of all vice, or the Elysium of every virtue and every grace. It is a sentence worthy of a Christian judge, that "marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil conse-

quences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious as well as a natural and civil contract: for it is a great mistake to suppose that because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other, is ratified and consecrated by a vow to God. . . . In the Christian Church marriage was elevated, in a later age, to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings[p]."

The inaccuracy of the preceding statements is not the only objection to the proposition, that marriage is in its own nature a civil contract, and nothing more. In the terms of civil contracts there is nothing fixed or definite, nothing which may not be varied in accommodation to the law of states, or the caprice of individuals. By the former, marriage has been, and may be, prohibited, to numerous classes of society, to the clergy, and to slaves: polygamy has been sanctioned, divorces have been permitted at pleasure. When marriage, as in the popular apprehension of Scotland, is regarded merely as a civil contract, of which the terms are to be explained by the secret understanding and intention of the contracting parties, it is terminable like all other civil contracts by their mutual agreement and non-ad-

[p] Dodson's Report of Sir W. Scott's Judgment of Dalrymple v. Dalrymple, p. 11.

herence. There is not only the extreme difficulty of proving the contract, but each under certain circumstances is free to depart from his engagement: a man may leave his wife, and a woman her husband, with as little compunction and restraint as they leave the house in which they have resided: in compliance with their passions or their interest, they may marry, they may separate; they may form marriages again and again; they may do injury without remonstrance in virtue of the uncertain tenure of a mutual agreement and merely civil contract. So when of old agreement was considered as the essence of a contract, and marriage, regarded apart from its religious character, merely as a contract of a civil nature, it was thought to be dissoluble by the consent, and at the mutual pleasure, of both parties[q], and thus the principle of divorces *bona gratia* was established. It is recorded of the Abyssinians also, that although as a doctrine they admit marriage to be of divine institution, the law puts no restraint upon polygamy, and "upon the whole marriage among them is no better than a firm bargain or contract, by which both parties engage to cohabit and join their stocks together as long as they like each other, after which they shall be at liberty to part[r]." Marriage upon such conditions is little better than constancy in willing concubinage: and although in England all the disadvantages of marriage contracted upon such a principle may not be seen, and may be counteracted by a

[q] Tebbs's Essay on the Scripture Doctrines of Adultery and Divorce, p. 236.

[r] Mod. Univ. History, vol. xv. p. 80.

prevailing sense of the divine institution and the divine law of marriage, men have not yet forgotten the consequences of violating the Marriage Act of 1754, of which the avoiding clauses must be ascribed to the power assumed by the state to fix the terms of the civil contract, and could not have been introduced without the admission of that power. By this Act a defect even in the forms of the civil contract was made sufficient to supersede the religious obligation: the civil contract, the chief point contemplated by the law, was declared to be null and void; private caprice was allowed to take advantage of the law, and unoffending truth could not escape its penalties. The parties agreed to-day to be called man and wife, to-morrow they agreed to renounce the title; and who can blame their decision who maintains that marriage is in its own nature a civil contract and nothing more?

The writer who is most distinct in the assertion that marriage, considered in its own nature, and abstractedly from the rules of Scripture, is a civil contract, and nothing more, admits, that there is nothing in the nature of the contract in which it differs from other contracts, or which prevents arbitrary divorce, except the expedience and policy which are involved in the care of children, and the general happiness of married life: and no man, who reflects how arbitrary are the rules of expedience, that one sex is to judge of their application to the circumstances of the other, and that the construction of them may depend upon many private considerations, will suffer the law of marriage to rest on the unsettled basis of a merely civil contract. The

manner in which Paley has argued the law of divorce, with reference to marriages contracted upon this principle, comprehends without any comment an insuperable objection to the doctrine.

" If we say that arbitrary divorces are excluded by the terms of the marriage contract, it may be answered, that the contract might be so formed as to admit of this condition.

" If we argue, with some moralists, that the obligation of a contract naturally continues so long as the purpose which the contracting parties had in view requires its continuance, it will be difficult to shew what purpose of the contract (the care of children excepted) should confine a man to a woman from whom he seeks to be loose.

" If we contend, with others, that a contract cannot by the law of nature be dissolved, unless the parties be replaced in the situation which each possessed before the contract was entered into, we shall be called upon to prove this to be an universal or indispensable property of contracts.

" I confess myself unable to assign any circumstance in the marriage contract which essentially distinguishes it from other contracts, or to prove that it contains what many have ascribed to it, a natural incapacity of being dissolved by the consent of the parties, at the option of one or either of them[s]."

Other writers, who have taken a juster and more comprehensive view of the principle of marriage, have come to a different conclusion in respect of its

[s] Moral Philosophy, b. iii. c. 7.

dissolution. "To the contract of marriage, besides the man and wife," said the great English moralist, "there is a third party—society: and if it be considered as a vow—God: and therefore it cannot be dissolved by their consent alone[t]."

"The first obligations," says Lord Stair, "put upon man by God were the conjugal obligations which arose from the constitution of marriage. Though marriage seems to be a voluntary contract by engagement, because the application of it is and ought to be of the most free consent, and because in matters circumstantial it is voluntary, yet marriage itself and the obligations thence arising are *jure divino*. Obligations arising from voluntary engagements take their rule and substance from the will of man, and may be framed and composed at his pleasure; but so cannot marriage, wherein it is not in the power of the parties, though of common consent, to alter any substantial; as to make the marriage for a time, and so of the rest, which evidently demonstrateth that it is not a human but a divine contract[u]."

"The case of a marriage contract is essentially different from other contracts: while with them it has its origin in the will of the parties, who may enter into it or not, as they choose, the rights and duties flowing from it, as well as its endurance, does not like them depend at all upon their pleasure. The relation of marriage is a contract *juris gentium*, affecting the personal *status* of the parties[x]." "This

[t] Boswell's Life of Johnson: the year 1776. [u] Fergusson, 340.
[x] Ibid. 327.

personal state or condition, whether it be that of marriage, or legitimacy, or whatever else, is something above any mere contract or ordinary agreement. It is attended with rights and consequences far more general, more lasting, and more important. The possessor of that character, wherever he goes, and in whatever outward circumstances he is placed, has a natural and just claim to have those rights which are attached to the condition supported in their greatest lawful extent and by all competent means. Relations so formed are fundamental as society, and universal as the human frame and constitution; nor are the obligations created by them peculiar to any place or to any system of municipal law. They are bounded under those systems, and distinguished in them, only by views somewhat different of general expediency: but wherever the possessors go they are entitled to the utmost protection which the laws of that place can afford. Not only therefore has marriage when it is once constituted no longer any local site or boundary, but it is in all respects different, both from contracts, which are the expressed will, and from questions of intestate succession and others, which are the presumed will of individuals. Relations of this kind are indeed established by positive agreement, but they cannot be dissolved, nor altered, nor modified, by the will of the related persons, nor, as to consequences, depend any how on their pleasure[y]."

The last objection to the doctrine, that marriage is a civil contract and nothing more, is, that it changes

[y] Quarterly Review, No. XLIX. p. 251.

the character of adultery, and reduces the worst of sins into a mere act of civil injury and inconvenience. It is thus made the chief offence of the adulteress that she violates the contract into which she has entered, and the injury sustained by the husband, and for which alone he is entitled to compensation, is the loss of his wife's society. It is a question from which a virtuous mind recoils, but which has nevertheless been debated, whether under the cover of the civil contract, and the power which a man possesses over the person of his wife, adultery, committed by the consent of both parties, and with a view to the procreation of children, might not lose its character of crime. The ancient practice of lending wives is a similar instance of the abuse of marital power.

The doctrine of the divine institution of marriage is not more worthy to be maintained as a theological truth, than from its practical use and improvement in the regulation of public law, and the elevation of private duty. It alone affords an invariable standard of the conjugal obligations. If it be admitted that marriage is of divine institution, it is not in the power or authority of man to impose restrictions or regulations which shall counteract that institution. Whatever was the primæval law of marriage, delivered with divine authority, the same should it remain in all its simplicity and integrity until the end of time. If in the beginning it was free to all men, it is still unrestricted: if it was originally a permanent union of one man with one woman, it still precludes all polygamy and all divorce: if its primary law imposed a voluntary and irrevocable engagement, it is still opposed to force and to caprice:

if its ultimate end was mutual society and the care of children, they are still its end and duty, and should not be neglected. No restriction can be properly laid upon a divine institution without the authority of a divine revelation. It is this divine institution which in all Christian countries has given a general sanction and authority to the permanent union of one man with one woman, which has prevented the human corruptions of constrained and involuntary celibacy, of polygamy, and arbitrary divorce, and which, in the perpetuity of the union, has provided a solace and support for infirmity and decrepitude, under which passion subsides into friendship, and the care of the woman, which is no more required in the nurture of children, blesses and is blessed in the mitigation of the sorrows of declining life. The Mohammedan law of marriage[z] may be accommodated to the unrestrained licentiousness of a tropical climate, in which woman is made the mere instrument of pleasure and of profit: but marriage as divinely instituted is adapted to all men in all ages and in all countries, the protection of his infancy, the happiness of his manhood, and the solace of his old age. It is wisely observed, that the connexion of other animals subsists only so long as is

[z] Monthly Review, vol. ciii. p. 299. Mohammedism "is well adapted to the servile population of the tropics, for it is not merely the hereditary and traditional religion of the African Blacks, but it opposes no obstacle to those frequent divorces, which the early decay of females in warm climates tends to render irksome to the husband, and which the frequent transfer of individual slaves to another plantation is calculated to make desirable to the slave-owner."

necessary to the nurture of the offspring: but in marriage the divine wisdom has provided a consolation as constant as the trials of humanity, ordained it the duty of filial piety to requite the cares of parental affection, and made children for the support of old age[a].

The authority of a divine institution affords an effectual antidote to the ignorant insinuations[b] against marriage and against women, which originated in the licentiousness of the Epicurean philosophy, were renewed in the heresies of the primitive Church, were enforced by the papists, and have not wanted advocates in the pride of modern infidelity, and the humours of its twin-sister, modern fanaticism. These unmanly sentiments will make no impression, they will not fail of immediate refutation, in minds persuaded that marriage proceeded not from the weakness of man, but from the wise and merciful providence of God, ever consulting the benefit of mankind. It will also inspire the heart with new gratitude, to contemplate the divine goodness in constituting the happiness of wedded life, and making the best provision for the religious education of children, and the care of his providence in preserving the purity

[a] Γηροβοσκους. Clem. Alex. Strom. l. ii. s. 23.

[b] The sentiments of the Philosophers, Heretics, and Romanists, are collected by Gerhard, s. 51, 52. The nineteenth century has produced the assertion, that "chastity is a monkish and evangelical superstition, a greater foe to natural temperance even than unintellectual sensuality: it strikes at the root of all domestic happiness, and consigns more than half of the human race to misery, that some few may monopolize according to law. A system could not well have been devised more studiously hostile to human happiness than marriage."

of his institution from the fraud and frailty of men, and blessing it in so many instances into the most perfect friendship and unity which man can enjoy upon the earth. It will call forth the spirit of prayer and supplication, that the continual dew of his blessing may be poured upon the state and upon all who enter it, that, as they enter it in the faith of its divine institution, they may discharge its duties in conformity with his will, and in humble hope of the benefits which it was designed to produce, seeing their children christianly and virtuously brought up, and continuing in holy love unto their lives' end. Even in the unhappy cases in which the marriage has been contracted without thought, in which the duties of the married state have been neglected, and its appropriate happiness has failed, even here, the necessary permanence of the union, which rests on the sole authority of the divine institution, will contribute to reconcile interests which cannot be separated, and mitigate evils which cannot be avoided; and men who are not entirely destitute of religious principle will fulfil, in compliance with the ordinance of God, what they would not attempt in conformity with the law of man[c].

The authority of reason and religion in sustaining the doctrine of the divine institution of marriage, and the beneficial influence of that doctrine, considered in itself, and in comparison with the unauthenticated position that marriage is a civil contract and nothing more, and the pernicious consequences which are inseparable from that position, may be

[c] Gerhard, sect. 48, 50, 52.

briefly recapitulated in the quaint but eloquent language of Bishop Jewel, in his treatise of the sacraments, in which he will not be suspected of maintaining the sacramental nature of marriage, while he affirms its divine institution and dignity.

"Of mariage I shall neede say the lesse, the matter is so known and common. This fellowship was first ordained by God himselfe in paradise. God himselfe said, It is not good that man should be himselfe alone: I will make him an helper meet for him. God, which fashioned man, and breathed in him the breath of life, and knoweth his very heart and raines, said, It is not good, it is not fit, that man should be himselfe alone. Although man were in paradise, although he were in the perfection of virtue, yet, saith God, he had need of a helper. Christ disdained not to be at a mariage; he honored it both by his presence and the working of a miracle. Saint Paul saith, Mariage is honourable in all men, and the bed undefiled. In all men, saith he, in the patriarchs, in the prophets, in the apostles, in martyrs, in bishops.

* * *

. . . "If you marke these fewe words which I delivered, it will easily appeare, how reverend an accompt is to be made of that state of life. For if you regard the necessity thereof, God found it good to give man a wife; if the antiquity, it was ordained in the beginning of the world; if the place, in paradise; if the time, in the innocency of man. If you regard any thing the rather because of him that ordained it, God was the author of mariage, even God which made heaven and earth, and which is the

Father of our Lord Jesus Christ. If you seek the allowance, Christ approved it by his birth in mariage and by his presence at mariage; if the dignity, it is honourable; if among whom, in all men, of all estates, of all callings; in prince, in subject, in minister, in people. It is honourable in prophets, honourable in apostles, in martyrs, in bishops[d]."

[d] A Treatise of the Sacraments, gathered out of certaine Sermons which the Reverend Father in God, Bishop Jewel, preached at Salisbury: published in (the third part of) his Works, 1609, p. 283, 284.

CHAPTER II.

THE RELIGIOUS RATIFICATION OF MARRIAGE.

SECTION I.

Expedience and Antiquity of the Religious Ratification.

THE establishment of the divine institution of marriage, and of the divine authority of the primary law of marriage, affords a safe and solid ground for the investigation of the nature and circumstances of marriage. It is prescribed in the divine law: For this cause shall a man leave his father and mother, and cleave unto his wife, and they shall be one flesh[a]. The terms of this law are plainly reciprocal: a man shall leave his father and mother, and cleave unto his wife or woman; and a woman shall leave her father and mother, and cleave unto her husband or man: and thus, leaving the nearest and dearest of their natural connexions, and cleaving unto each other in the new relation of husband and wife, they shall be indissolubly united in that union which is represented as the unity of one flesh. The nature of marriage, thus exhibited in the divine law, is the permanent union of one man with one woman; and this nature of marriage is distinctly recognized in the formularies of the national Church, in which the parties engage severally, that they will live together after God's ordinance, in the holy estate of matri-

[a] Gen. ii. 24.

mony, and that, forsaking all other, they will keep each to the other, so long as they both shall live, and until death shall part them.

This is the true nature of marriage; the reciprocity of the terms used in the divine law implies a mutual agreement of the parties respectively, to forsake the dearest, and, with the dearest, all other relations, and to form a permanent and indissoluble union with each other. The first condition is the mutual agreement, contract, or espousals of the parties, and to this agreement must be added such a ratification as shall render the agreement irrevocable, and the contract indissoluble: and the interest of the parties, the interest of the offspring, the interest of their kindred, the interest of society, all agree in requiring that the consent shall be pledged under such circumstances, that the obligation shall not be retracted. A private engagement of the parties upon arbitrary terms, which they themselves shall settle and interpret, and which they shall be at liberty to alter or rescind, is not sufficient to constitute a marriage contemplated by the light of Scripture, which insists upon the permanence of the conjugal union, and authorizes the inference of the necessity of a public ratification, in the presence of witnesses who may certify the terms of the consent, and by their testimony enforce the fulfilment of the obligation.

The publicity of marriage does not infringe the simplicity of the primary institution. The Almighty God was himself witness of the first espousals. It was at the time that the Lord God brought the woman unto the man, and in his immediate presence, that Adam, in acknowledgment of his intimate and inseparable

union with Eve, exclaimed, This is now bone of my bone, and flesh of my flesh; and that the law of marriage was delivered, requiring, in correspondence with the words of Adam and with the circumstances under which the woman was created, that the man should cleave unto his wife, and they should become one flesh[b]. The example of the first marriage would naturally recommend the presence of parents and other relations at succeeding marriages; and hence may have proceeded the celebrity of the nuptial feast, for the purpose of attesting and publishing the marriage[c]. The barbarous practice of buying a wife implies the presence of a seller; and the various gifts, which under different names have from the remotest periods accompanied the marriage, have been inanimate proofs and attestations of the engagement. In the forms of ancient espousals the contract was often made, not between the parties immediately interested, but between the parents and other relations, who thus became both parties and witnesses to the covenant[d]. The writers who have ventured to contend that the consent of parents is involved in the terms of the primary institution, are necessarily opposed to the clandestinity of marriage; nor can the doctrine, that marriage is a civil contract, be sustained, without admitting the necessity of witnesses to prove and confirm the contract. The argument is confirmed by the practice of Scotland, where all which is necessary to the validity of the contract, is a declaration of the consent of the parties: notwith-

[b] Gen. ii. 23, 24. Gerhard de Conj. s. 44, 45, 455.
[c] Potter's Antiq. b. iv. c. 11. [d] Ux. Ebr. l. ii. c. 19.

standing the apparent simplicity of the contract, the matrimonial law of Scotland is more intricate and involved than it is easy to conceive, from the extreme difficulty of proving whether there has or has not been a marriage; and even the evidence of the fact may be counteracted by the allegation, that there was a secret understanding between the parties, and that it was not their intention to contract matrimony by the ostensible act.

There is nothing in the state of marriage, considered in its proper nature, and undertaken upon worthy motives, of which a man should be ashamed, or which a man can endeavour to disguise, or to take upon himself clandestinely and without witnesses, without incurring the suspicion of some vicious principle, which actuates the desire of concealment, and which suffers him, by disowning, to dishonour his wife and children, and to place them in an equivocal light before the world. Concubinage may seek the shade and shelter of retirement, but marriage has a public character, and demands a public recognition. It is for the honour and interest of the parties and of their respective families, that their marriage should be known and undisputed. An honourable man does not blush to avow an honourable connexion; he cannot suffer the honour of his wife to be called in question, or that she should not be acknowledged in the character which she is entitled to sustain; he is anxious that the line of his inheritance should be undisturbed, and that all the offices and all the immunities of wedded life should be secured, by the public celebration of his marriage, in conformity with the laws of the state in which he

lives, and which has a public interest in ascertaining the marriage of the citizen, as it affects the rights and privileges of him and his children, and a public duty in preventing the evils and litigation which result from a doubtful and clandestine marriage.

It will be the object and endeavour of every Christian community, to make the publicity of marriage, and the presence of witnesses, subservient to the great end of securing, in conformity with the divine institution, the permanent union of a man with his wife, upon terms which shall not be liable to misapprehension, by a form which shall be sanctioned and enforced by the laws, and by the solemnity of a vow which shall bind the conscience. That the ratification of the private agreement should not only be public, but accompanied with religious offices, is consistent with the nature of marriage, and agreeable to the common sense of mankind, attested with very few and inconsiderable exceptions in the practice of all countries, in which "the bond of wedlock hath been always more or less esteemed of, as a thing religious and sacred[c]."

It would not be precipitate to assume the religious ratification from the characteristic holiness of marriage. Marriage is holy in its origin, which is the ordinance of the holy God, whose institutions cannot but be holy: it is holy in its celebration, or the Son of God would not have honoured the nuptial banquet with his presence, and the first fruits of his miraculous power: it is holy also in its end, which is the religious education of the offspring, the per-

[c] Hooker's Eccl. Pol. b. v. s. 73.

petuation of a godly seed, an end which called forth the admiration of the heathen philosopher[f], which is distinctly asserted by the prophet Malachi[g], and which is insinuated in the argument of Saint Paul, in which he presses the sanctification of the children as a prevailing motive against the separation of the believing and the unbelieving consort[h]. Its typical use and signification are also such as reflect the strongest light upon the sanctity of marriage. The prophets again and again represent the relation which the Almighty God vouchsafed to bear to the Jewish Church, under the name of a marriage, which has also been considered in all ages a proper emblem of the mysterious unity between Christ and the Church. The Jews understood the marriage of Adam and Eve to be typical of this divine union, which is also represented in terms appropriate to marriage by David[i], and by Solomon also in the Book of Canticles, in which he expatiates upon the doctrine in all the luxuriant imagery of the East. Saint Paul makes the comparison at considerable length in respect of the Church in general[k], and he confesses himself to be jealous over the Church of the Corinthians in particular, with a godly jealousy, because he had espoused her to one husband, that he might present her a chaste virgin unto Christ[l]. He warns the Romans of their being married unto Him who is raised from the dead[m]. The Baptist also calls our Lord the bridegroom, and himself the friend of the

[f] Plato quoted by Comber. [g] Mal. ii. 15. [h] 1 Cor. vii. 14. [i] Psalm xlv. [k] Ephes. v. 25—32. [l] 2 Cor. xi. 2. [m] Rom. vii. 4.

bridegroom[n]; and our Lord, in many of his parables and discourses, appropriates the title to himself. The Evangelical prophet uses the same metaphor of marriage in describing the Church, in whose name he says, I will rejoice in the Lord, my soul shall be joyful in the Lord; for he hath clothed me with the garment of salvation, he hath covered me with the robe of righteousness, as a bridegroom decketh himself with ornaments, and as a bride adorneth herself with jewels. And again: As the bridegroom rejoiceth over the bride, so shall thy God rejoice over thee[o]. The same allusions to marriage are found in the Apocalypse, when the enraptured prophet saw the heavenly city, the new Jerusalem, coming down from heaven, as a bride adorned for her husband; when he was invited to see the bride, the Lamb's wife, and when he unfolded the infinite joy and glory which shall be consummated at the marriage feast of the Lamb[p].

It is the more necessary to insist upon this metaphorical representation of the unity of Christ with his Church, under the name of marriage, and upon the high authority of the holiness of marriage, as an inference from that representation, because it has been insinuated, with little knowledge of Scripture, of primitive antiquity, and of the history of the doctrine of marriage and divorce, that the propagation and maintenance of this opinion in the thirteenth century, upon the authority of the Fathers, gave rise to the notion of the indissolubility and sacramental

[n] John iii. 29. See Ux. Ebr. l. ii. c. 16. [o] Isa. lxi. 10. lxii. 5. [p] Rev. xxi. 2, 9. xix. 7, 9.

character of marriage, and was the ground upon which the religious ratification superseded what is affirmed to be the more ancient doctrine, that marriage is a civil contract in such a sense, that being improperly contracted it may be annulled, notwithstanding the religious ratification[q]. It is more necessary to notice, than to refute, such a series of assumptions, which have no foundation in fact, and no power to disparage the truth. There are other arguments of a more practical nature confirmatory of the holiness of marriage, and contributing to justify the inference of its religious ratification.

It is one of the chief rules of Christian duty to do all things decently and in order[r], and to do them in the name of the Lord Jesus Christ, giving thanks to God and the Father by him[s]. This rule is immediately connected by the apostle with the duties of husbands and wives; and it appears consistent, that a Christian man, in appropriating to himself the benefits of the divine institution, should acknowledge the ordinance and intreat the blessing of God. The Christian is also required to marry in the Lord[t], and the community of faith prepares the way for a community of religious offices: and as marriage derives its origin and authority from the institution of God, it is but natural that the mutual vow, which is made in virtue of his ordinance, should be confirmed and made obligatory upon the conscience by an act of solemn adjuration and invocation of his name. The

[q] A. L. Schott. Accessiones Juridicæ, ad Gerhard Tract. de Conj. ad sect. 63. sqq.

[r] 1 Cor. xiv. 40. [s] Coloss. iii. 17. [t] 1 Cor. vii. 39.

duties and the cares of marriage are of such a nature as to demand all the advantage which can be derived from the solemnity of a religious ratification, and all the aid which can be obtained by public prayer and intercession. In entering into a covenant which death only can dissolve, in devoting his whole confidence and love to the wife of his bosom, in resigning the preferences of his own will to the duty and upon the condition of mutual submission, in anticipating the anxieties which are inseparable from the maintenance and education of children, and in revolving all the changes and chances of wedded life, of richer and poorer, of better and worse, of sickness and of health, until death shall determine them, the pious man will not scruple to strengthen his heart with a regulated faith in the ordinance and dispensations of God, and with earnest prayer that his goodness may bless, in the happiness of the individual, what his wisdom has provided for the benefit of mankind: and in the solemn act of forsaking his father and mother, with a grateful recollection of the experience of his youth, and of cleaving unto his wife, to become the head of a new family, he will not think it enough to make even a public declaration of his engagement, without at the same time invoking the aid of Him, who is at once the author of marriage, and the present witness between a man and the wife of his youth—of Him who alone can bless the fulfilment, and punish the violation, of the conjugal vow.

Such considerations have operated in all ages and in all countries to connect the ratification of marriage with religious rites. The practice is not with-

out exception; but the exceptions are of such a nature as to give force and validity to the rule. The form of Spartan marriages, as it is recorded by Plutarch[u], is quite peculiar: but while it was conducted secretly by the parties, and with an entire neglect of religious ceremonies, there was the appearance rather of an intrigue than of a marriage, which was so rigidly concealed, that the bride often became a mother, not only before she was publicly acknowledged, but before she was even seen by her husband in the light of day. In other countries the barbarous condition of the people abates the weight and authority of the example, or the brief and imperfect record of their manners renders it hazardous to draw any conclusion in favour or in prejudice of the religious ratification. Thus among the ancient Germans, the man sent to the woman whom he proposed to marry a dower, and afterwards presented her with a bridled horse, oxen, a shield, sword, and arms[x]. Among the Rhodians the bride was summoned to her husband's house by a herald, and upon his proclamation was conducted to the chamber[y]. The Bœotian bride was covered with asparagus, and afterwards crowned[z]. The Persians and the Assyrians confirmed their espousals with joining

[u] In v. Lycurg. Potter's Antiq. b. iv. c. 11.

[x] Tac. de Mor. Germ. sect. 18. where he contrasts the simple manners of the Germans with the customary ceremonies of his own age and country, with reference to which he pronounces of their nuptial gifts, Hoc maximum vinculum, hæc arcana sacra, hos conjugales Deos arbitrantur.

[y] Plutarch. in Problem. c. 140. apud Gerhard, s. 458.

[z] Plutarch. in Præcept. Connub. c. 2. Ibid.

of hands[a]. A religious ratification appears to be more distinctly insinuated in those forms in which the participation of some libation or sacrifice may be disguised under the ordinary acts of eating or drinking. The splendour of the marriage feast among the Persians is expressly recorded in the history of Ahasuerus and Esther[b]. The Macedonians ate bread which had been cut with a sword[c]: the Galatians drank out of the same cup in token of the community of marriage[d]. In some places it was the custom for the bride and bridegroom to pass under a yoke; but the custom is no otherwise remarkable, than as it gives the name to the conjugal union, and as it attests the divine and sacred character of marriage, by assigning the epithet of *jugalis* to Juno[e]. In Scotland the practical inconvenience more than compensates the theoretical simplicity of

[a] Arrian. de Gest. Alexandr. l. iii. Ibid.

[b] Esther ii. 18.

[c] Qu. Curtius, l. iii. apud Gerhard.

[d] Plutarch. lib. de Cl. Mulieribus. Ibid. Similar rites prevail among the Caffres, whose wives are sometimes courted, more frequently bought, at the price of ten or more cows. The bride is carried to the bridegroom's hut, and examined by the matrons of the craal; if she is approved, a number of oxen are killed, and the whole party feast for four days running. On the fourth day the bride is stripped naked, and carried by two of her companions round the whole circle; she is then presented to the chief of the clan, who exhorts her to be a good wife and mother, and faithful to her husband. The bridegroom follows, and receives the same injunctions. On his return to his party his relations present a vessel of milk to the bride, reminding her whose cows produced it. She drinks of it, and by that act becomes his lawful wife. Enc. Metropol.

[e] Gerhard, sect. 458.

the merely civil contract of marriage, confirmed without a religious ratification.

Whatever may be thought of exceptions of a character so entirely negative, they cannot be suffered to counteract the positive evidence of the religious ratification of marriage which is derived from the ordinary practice of the heathens and the Jews, and which is recommended in the allusions of Scripture, explained by the rites which have been used in the Christian Church from the earliest periods, which together form a cumulative argument in favour of the religious ratification, equivalent to an universal tradition, corresponding with the common sense and reason of mankind. The consecration which God has given to marriage is, "by the sense of all civilized nations, attested in their earliest writings: which are the only proofs that can in reason be expected of a consecration of the state by God himself in the first settlement of civil societies long before the earliest writings[f]."

The ancient Alexandrians required the presence of a priest, and did not allow any marriage of which the priest of the goddess Isis had not signed the instruments with his own hand[g]: and it is related of the Egyptians in general, that their marriages were anciently celebrated in the temple of Isis, and that the man swore that he would love the woman dearly; and the woman, that she would make the man her husband, and lord of all that she had[h].

[f] Leslie's Sermon concerning marriages in different communions, prosecuted by Dodwell, p. 30.

[g] Ux. Ebr. l. ii. c. 28.

[h] Shepherd's Elucid. of Com. Prayer, Form of Sol. of Matr.

Sacrifices at marriage were also customary among the ancient Latins and the ancient Greeks in Italy, as was the sacrifice of a victim on the day following the marriage. In Hetruria, when the kings and chief men contracted marriage, it was usual for the bride and the bridegroom to slay a hog. The practice of the Thessalians was to celebrate sacred rites before marriage under the name of γαμοδαισια. And even in Mexico marriages were not contracted without the use of incense[i]. It is a remark old and true, that even the men whom the first origin of society has scattered in the uninhabitable regions of the earth do not contract matrimony without the proper solemnities of marriage[k].

In countries of which the manners are more fully known there is more clear and distinct evidence of the religious ratification of marriage, and of the sacerdotal benediction, either expressly asserted, or implied in the oblation of prayers and sacrifices, without which there was no celebration of marriage[l].

Sufficient traces are preserved of the form of celebrating marriage among the Greeks to leave no doubt of the use of religious rites. Among the Locrians and Bœotians the bride and bridegroom usually ratified the marriage by a solemn libation[m]; and before the marriage they offered sacrifice to Euclia, who had an image in the market-place, and is supposed to have been the same with Diana, the goddess of virginity. There is the most copious evidence

[i] Ux. Ebr. l. ii. c. 21.
[l] Servius ad Æneid. iii. Gerhard.
[k] Arnob. Adv. Gentes, l. i. c. 2.
[m] Plutarch. in v. Aristid. apud

of the law and ceremonies of marriage among the Athenians, which they ascribed to the Muse Erato, and which were certainly of remote antiquity, and had the sanction of the highest authority, that of Plato, who recommended, in different treatises[n], that the inauguration of marriage should be conducted by the priests, with the oblation of prayers and sacrifices, and that certain festive rites should be appointed by the laws, in which the bridegroom and the bride should make their covenant; in which sacrifices should be offered, and hymns be sung, appropriate to the celebration of marriage. When the Athenian girls attained the age of marriage, it was usual, κανηφορειν, to offer baskets full of curious trifles to Diana, to deprecate the anger of the goddess, and to obtain her permission to quit her train, and cease to be one of the αζυγες κοραι, offering at the same time the sacrifices of a calf or young heifer[o], which had never been joined or married to the yoke. When the girl was betrothed, she was led by her parents into the temple of Minerva in the citadel, to take her leave of that virgin goddess, and sacrifices were offered upon the occasion[p]: she was also presented to Diana before it was lawful for her to marry, and that she might propitiate the favour of the goddess with certain ceremonies. On the day before the marriage, which was thence called γαμηλια κουρεωτις, or the day of the matrimonial tonsure, it

[n] De leg. l. v. De rep. l. v. apud Gerhard.

[o] μοσχοι τε προ γαμων, ἀς θεᾳ πιστιν χρεων,
Αρτεμιδι. Eur. Iphig. in Aul. v. 1112.

[p] This day, according to Julius Pollux, Onomast. l. iii. was called προτελεια. Brisson de Jur. Con.

was usual to shave the head and to present a lock of the hair to the goddess[q]. Sacrifices were also offered to Venus and the Graces for the past, to Juno, as Pronuba, for the present, and to Lucina, or Materfamilias, for the future; and, whether they were offered to Diana or to Juno, these sacrifices and the prayers which accompanied them were called γαμηλιοι ευχαι, προγαμεια, προτελειαι ευχαι or προτελεια. It is known that marriage was called τελος, to marry τελειωθηναι, married persons τελειοι, the gods who were the chief patrons of marriage Jupiter τελειος and Juno τελεια, the marriage, the day and the sacrifice of marriage, τελειον, and the preparatory sacrifice προτελεια. It may be difficult to ascertain the original use and intention of these terms, which, although they may contain an allusion to marriage, as a perfect state of life, proper to perfect men, may be more distinctly and decisively referred to the religious rites of marriage, and to the sacred initiation of the persons to be married. The Athenians understood by προτελεια generally any acts or gifts preceding the dedication of any thing which was offered to the Deity, and especially the prayers and sacrifices which accompanied marriage, which they called τελος, because it was a sacred perfection of things which concern human life. They held marriage to

[q] Rous Archæolog. Att. l. iv. c. 7. Potter represents this ceremony with its appropriate titles to be peculiar to one day of the ceremony, called Apaturia, when fathers had their children entered in the public registers, and offered sacrifices for their prosperity, with a particular respect to their marriages. Antiq. b. iv. c. 11. from whence, and from the corresponding chapter of Rous, this account of the Grecian marriages is chiefly taken.

be a mystery, and therefore they used terms denoting the initiation and purification preparatory to the mysteries[r]. The classical writers, in their frequent allusions to the prayers and sacrifices of marriage, convey the strongest proof of the ordinary practice of the age[s].

Other gods, besides those which have been mentioned, were concerned in the nuptial solemnities. The Spartan mothers, notwithstanding the secrecy and clandestinity of their marriages, sacrificed to Venus Juno when their daughters were married; and the most ancient Athenians paid the same honours to heaven and earth, whose combined energy in the production and maturity of all fruits was esteemed a fit emblem of marriage. The Fates were also propitiated, as were different deities at different places: and religious honour was especially shewn upon the occasion at Trœzen, to Hippolytus, who died to preserve his chastity; at Megara, with libations to Iphinoe, who died a virgin; at Delos,

[r] Lycurgus apud Brisson de ju. Con. Dionysius Areop. Ep. 7. with the note of Maximus the Scholiast, apud A. Hotman de Vet. Rit. Nupt. c. 1.

[s] πολλης δε χωρας τησδε τ' αγροθινια
θυη προ παιδων και γαμηλιου τελους. Æsch. Eumen. v. 832.

——ut Solenni more sacrorum
Perfecto, posset claro comitari Hymenæo. Lucr. l. i. v. 97.

Inde ubi Sacrificans cum conjuge venit ad aras
Æsonides, unaque adeunt, pariterque precari
Incipiunt; ignem Pollux undamque jugalem
Prætulit, ut dextrum pariter vertantur in orbem.

Val. Fl. Argon. l. 8. apud Brisson. "Aristoteles in Œcon. l. i. c. 3. citat Pythagoræ sententiam, quod maritus debeat uxori beneficentiam et tutelam, quia sponsa ei ad aram, ut supplex, commendatur." Gerhard.

to Hecaerge and Opis; at Argine and Athens, to Minerva.

Other preparatory ceremonies[t] were observed, and care was taken by the parents and the relations to consult[u] the deities who superintended marriage, especially Jupiter ομογνιος and Juno συζυγια, with prayers and sacrifices. When the victim was opened the gall was thrown behind the altar, because it was the aversion of the gods of love, and the emblem of anger, from which marriage should be free. The entrails were carefully examined, and if any unfavourable omen appeared in them, or indeed in any other way, the contract was dissolved, as displeasing to the gods. The most favourable omen was a pair of doves, denoting constant love, or of crows, whose long life promised a perpetuity of happiness; but care was taken to prevent the appearance of a single crow, which threatened separation, and the evil influence which its appearance might excite. Another method of averting evil was, to inscribe on the door of the house, Let no evil enter.

One principal end of the marriage feast was, to pay the respect which was due to the gods of marriage, who were invoked before the feast, in which they had no common share, and in which they were

[t] The order of the several ceremonies is preserved by Euripides, Iphig. in Aul. v. 713.

Κλυ. προτελεια δ' ηδε παιδος εσφαξας θεα;
Αγα. μελλω γ' επι ταυτη και καθισταμεν τυχη.
Κλυ. καπειτα δαισεις τους γαμους εστιατορων;
Αγα. θυσας γε θυμαθ' ἁπερ μ' εχρην θυσαι θεοις.

[u] Idque fecerunt sacrificio perfecto et consulto Deorum numine. Alex. ab Alex. apud Comber.

especially honoured, with dancing, and music, and and songs, addressed chiefly to Hymen.

The bride was conducted to her chamber with torches, which it was the office of the mother[x] to bear, and which are supposed to have been five, according to the number of the gods of marriage, Jupiter τελειος, Juno τελεια, Venus, Suadela, Lucina.

Whatever may be thought of these practices of ancient superstition, they leave no doubt of the religious ratification of marriage among the Greeks, of whom none but the Lacedemonians contracted marriage clandestinely and without a religious ritual; and even among them the piety of their mothers did not neglect the intercession which was due upon the marriage of their children. There is full evidence of the same sacrificial rites in the celebration of marriage among the Romans, nor is it necessary to insist upon the ancient and ingenious but unauthorized and doubtful conjecture of Verrius Flaccus, the Roman jurist, who derives the name of *sponsus* and *sponsa* from the sacred rites and libations which were common to the occasion[y]. It is more important to observe, that marriage, among the Romans,

[x] εγω δ' ουτε σοι πυρος απτφα φως
νομιμον εν γαμοις
ὡς πρεπει ματρι μακαριᾳ. Eurip. Phœniss. v. 339.

[y] Quod σπονδας interpositis rebus divinis facerent. Brisson. de Rit. Nupt. Selden, de Jure Nat. et Gen. l. v. c. 7. observes, that the name of uxor "a Grammaticis aliquot a sacro ungendi, in solennibus nuptiarum, liminis ritu peti, ideoque etiam *unxorem* eam olim dici: perinde ac si absque sacris illis seu solennibus nuptiarum etiam ex ipsa vocabuli vi, nulla proprie illo nomine fuisset indigitanda."

was an affair, not merely of civil law, but chiefly sacred and pontifical, and such as could not be contracted without invoking the aid of the Divinity[z]. It was in compliance with this prevailing opinion, that when Augustus was desirous of marrying Livia, he made a pretence of consulting the pontifices, and of hesitating to marry without obtaining their consent. In the most ancient periods the nuptial union was ordinarily celebrated in Hetruria, with the sacrifice of a hog: nor was marriage ever contracted without sacrifices, or without taking the auspices; and the Aruspices were so generally present at the marriage, that an incestuous marriage is described by Cicero, as one that was contracted without auspices, without authority, and with omens unfavourable[a]: and it was considered as a general mark of the degeneracy of Roman manners, that their office, in respect of marriage, fell into disuse, or was merely nominal[b], and that marriage was celebrated without espousals, silently, and without rites, in a manner foul, base, and disapproved[c]. There were three principal kinds of marriage at Rome, that by use, that by purchase, and that by confarreation.

Marriage was contracted by use or possession, when a woman, under the advice of her guardians, cohabited with a man for a whole year, without being absent from him for more than three nights. Nothing is known of the form of contracting these marriages, which derived their origin from the rape

[z] Fr. Hotman de Sponsal. c. 2. Gerhard, s. 457. [a] Orat. pro Cluentio. [b] Cic. de Divin. l. ii. Plautus. Lucan. Juvenal. apud Hotman. [c] Fr. Hotman de Sponsalibus, c. 7.

of the Sabine women[d], and of which the frequency is reckoned among the signs of a degenerate age. Cicero however maintains, that no marriage was celebrated without auspices; and Selden[e] conceives it to be incredible, that even these marriages should be deficient in the appropriate solemnities. He produces no authorities in favour of a religious celebration, but argues on the general notion of sanctity in respect of marriage, which obtains among the Pagan writers, and especially upon the allusion of Arnobius to the marriage of the gods, according to the heathen rites: The gods have wives and enter into matrimonial treaties, upon conditions previously agreed upon; by use, by confarreation, by purchase, they engage the sacred rites of the genial bed; they have the brides whom they desire, for whom they contract, whom they attach to themselves by the stipulations which are interposed. And what shall we say concerning these conjunctions? You admit that upon occasion some of the Gods have celebrated marriage, and joined in the sacred choir in which the goddesses have joined, and that because they did not participate in the fescennine song, they have thrown all things into confusion by their discord, and scattered the varieties of evil among the human race[f]. The same writer asks generally of the heathen, When you contract marriage, do you not spread the genial bed with a toga, and invoke the genii of husbands? Do you not offer the robes of the damsels to the Fortune which presides over virgins[g]?

[d] Gerhard, s. 456. adv. Gen. l. iv. s. 20.
[e] Ux. Ebr. l. ii. c. 21.
[f] Arnob.
[g] Ibid. l. ii. s. 67.

The second kind of marriage was by coemption or purchase, and had its proper ceremonies of auguries, auspices, sacrifices, and oblations[h]. The form of the contract was, that the man asked the woman whether she would be the mother of a family? She assented, and asked in her turn whether he would be the father of a family. On the declaration of his assent the woman passed into the hands of the man[i]. "In a country where the women are universally regarded as the slaves of the other sex, it is natural to expect that they should be bought and sold like any other species of property. To marry a wife must there be the same thing as to purchase a female servant, who is to be intrusted under the husband's direction with a great part of the domestic economy." This has been the common practice of savage nations, in which the wife is commonly bought by the husband, and the conclusion of the bargain, together with the payment of the price, is the most usual form or solemnity in the celebration of their marriages. So by the ancient law of the Romans, a wife was considered as in every respect the slave of her husband. She was bought by him, "she might be sold by him, or she might be put to death by an arbitrary exertion of his authority. From the ceremonies which were used in the more solemn and regular celebration of marriage, it seems probable that in early times the wife was purchased with a real price from her relations[k]."

[h] Ux. Ebr. l. ii. c. 21. [i] Gerhard, s. 456.

[k] Miller on the Origin of Ranks, p. 39—44. From this practice of coemption he derives the custom of the husband's giving a

The most solemn and ancient mode of marriage was, however, by confarreation, which has been ascribed to Numa Pompilius, and was proper to the priesthood, to whom it was an indispensable qualification, and by whom alone it was conducted, and consisted entirely of sacrifices, especially of bread made of barley. The Pontifex Maximus and the Flamen Dialis presided over the nuptial sacrifice, or over the marriage, which was sacred in itself, and they were themselves required to be married in this form; and none but children born of parents married by confarreation, could hold the office of the Flamen Dialis[l]. The method of these marriages was, that by the use of certain words in the presence of ten witnesses, and after a solemn sacrifice, conducted by the priest, in which barley bread was chiefly used, the woman was given to the man. In these marriages the priest joined the hands of the parties, as appears from a coin of Adrian, bearing the inscription, CONJUG. AUG. in which the emperor is represented giving his hand to the empress, in the presence of the priest, who is standing between them[m]. This was the most religious form of marriage, nor was any of the Roman rites more venerable than the

dowry to the wife or her relations, instead of the wife bringing along with her a dowry to the husband.

[l] Ux. Ebr. l. ii. c. 21. Brisson, de Rit. Nupt. A. Hotman, de Vet. Rit. Nupt. c. 20. Gerhard, s. 457, observes, that the velum flammeum, which was worn by the bride, derives its name "a Flaminica, id est, Flaminis uxore, ut de indissolubilitate conjugalis vinculi novæ nuptæ admonerentur, quia Flamini non erat permissum cum uxore divortium."

[m] Ux. Ebr. l. ii. c. 28.

bond of confarreation[n], and it is with distinct reference to this form that the Romans called sacred and lawful marriages *farreacea*, and to be married, *confarreare*[o].

Besides these solemn rites of marriages, there were others conducted in a more private manner. There was the prayer of the mother of the woman, in which she entreated of Jupiter and all the Gods, that whatever Maijugena had prepared in the name of espousal gifts might be publicly delivered, that the virgin might never be destitute of the dowry, and that they would then suffer the instruments of the Papian and Poppean law to be recited[p]. There was the sacred use of fire and water, which were ordained of old for the confirmation of marriage; and the holy influence attached to these elements was designed to represent a sacrificial purification, a promise of issue, and a conjugal community of goods[q]. There were also the sacrifices which the woman offered, the day after the marriage, in auspicious celebration of her conjugal liberty[r]. The day of marriage was spent in feasting, dancing, and sacrifice, especially of a hog[s], in the oblation of which the parties pledged themselves, in the presence of the gods, for the happiness of the marriage, and the inviolability of the vow. When the woman was conducted to the house of her husband, the house was furnished with frankincense and other spices, and the nuptial supper was

[n] Plin. Nat. Hist. l. xviii. c. 3. apud Comber. de Vet. Rit. Nupt. c. 21. [o] A. Hotman, [p] Ibid. c. 2. [q] Ibid. c. 18. [r] Macrob. Saturnal. l. i. c. 15. apud Gerhard. A. Hotman. [s] Varro apud

distinguished by a general acclamation of happiness, *Feliciter!* to the new married couple[t]. The chamber was adorned with images of the gods, and there was a dedication of the girdle to Juno and Diana, with other rites anciently observed, which the refinements or the corruptions of later times did not allow. There were sacrifices to the god Jugatinus, that the man and the woman might be yoked in marriage; to the god Domiducus, that the bride might be conducted home without injury; to the god Domicius, that the bridegroom might be willing to remain in his house; and to the goddess Maturna, that the bride might willingly remain with her husband[u]. In Rome, as in Greece, Jupiter and Juno were esteemed the presidents of marriage, and also the authors of marriage; nor was there any limit to the number or variety of the deities that were appropriated, under the polytheism of ancient Rome, to the several offices of marriage, or of the trifling, absurd, and unbecoming superstitions, which polluted the ostensible sanctity of the institution; superstitions which could have no origin but the feverish lasciviousness of their authors and inventors, and justly challenged the strongest and most indignant censures of the early writers of the Church[x].

Among the Hindoos, whose customs have descended with little variation from remote antiquity, marriage is contracted with sacred rites. The bridegroom goes in procession to the house of the bride's

[t] Gerhard, s. 456. Ux. Ebr. l. ii. c. 21. Juvenal, Sat. ii. 119.
[u] A. Hotman, de Vet. Rit. Nupt. c. 29, 30.
[x] Augustin. de Civitat. Dei, l. vi. c. 9.

father, from whom he receives the bride in the form usual at every solemn donation: after certain preparatory forms the bridegroom makes oblations to fire, on which the bride also drops rice as an oblation. The bridegroom then solemnly takes her hand in marriage; she treads on a stone and *mullar*, they walk round the fire; the bride steps seven times, conducted by the bridegroom, and he then dismisses the spectators, the marriage being now complete and irrevocable. The ceremonies attendant on the marriage of two Brahmins are still more curious, and bear evidence, not only of sacrificial rites, but of the sacerdotal presence and benediction. The day is fixed by the family priest or Purohita, who also accompanies the procession of the bridegroom to the house of the bride. In the course of the marriage rites, the Purohita recites verses to Vishnu and other deities, praying them to watch over the destinies of the contracting pair; then the bride and bridegroom pour handfuls of rice on each other's heads, and the father of the bride, joining his daughter's hand with that of the bridegroom, says, I give this virgin to you for a wife. Upon this the Purohita, after investing the bridegroom with various ornaments, performs a *homam* or burnt-offering before the pair, putting grain into different pots. Other ceremonies follow, figurative of the ends of marriage, intermixed with *muntras* or prayers, addressed principally to female divinities, for the happiness of the one in question. At night another *homam* is performed, and further ceremonies take place, which are repeated with variations for five successive days. On the last day is performed the ceremony of dismissing the

manes of their ancestors who had been invoked to be present at the wedding[y].

It is necessary to turn from these superstitions of the heathen, to the purer and more simple rites which ratified the marriages of the Jews, and which possess the same sacred and sacrificial character. There is the most ancient testimony that their marriages were celebrated in public; and there is distinct and copious evidence, both of history and in the allusions of the prophets, and the parables of our Lord, concerning the prolonged ceremonies of the nuptial banquet; the dress of the bride and the bridegroom; the procession of the bridegroom to the house of the bride; and of the prayers and benedictions which were usual upon the occasion[z].

The espousals of the Jews were ordinarily celebrated with a sacred benediction in this form: Blessed be the Lord God, the King of the world, who hath sanctified us by his precepts, who hath interdicted incest, and required abstinence in them that are betrothed, but permitted the use of the wife, with whom we are united, in the chamber and by espousals. Blessed be He, who hath sanctified his people Israel, both in the chamber and by espousals. This form, which is ascribed to Ezra and the rulers of the great synagogue, was ordinarily used by the bridegroom, or some one in his name, before the deeds or instruments of espousal were read, and it is still retained in the Jewish rituals. This form was accompanied with another ancient practice, of drinking

[y] Strange's Elements of Hindoo Law, vol. i. p. 43. vol. ii. p. 54—56. Monthly Review, Jan. 1826.

[z] Gerhard, s. 459.

wine or some other liquor, which had also its appropriate benediction: Blessed be the Lord our God, who hath created the fruit of the vine. At the end of this benediction the cup was given, by the person who pronounced the blessing, to the persons espoused, or to the bride by the bridegroom, who in that case both blesses the wine, and is the first to taste it. These benedictions were performed under a canopy, which explains the Psalmist's description[a] of the sun going forth as a bridegroom from his chamber or canopy, and rejoicing. In more recent times the form of espousals was made or repeated shortly before the marriage in the public synagogue, as may be seen in the modern rituals[b].

The Jews had two kinds of wives, whom they distinguished into primary and secondary wives. The primary wives were called Naschim, and being betrothed with more solemn forms, and married "with nuptial ceremonies and rites requisite," they possessed superior authority in themselves, and conveyed a right of inheritance to the children; which privileges did not belong to the concubines or secondary wives[c]. The rites and ceremonies of their marriages consisted chiefly of blessings and thanksgivings unto God, whence the house was called the house of praise, and the marriage song praises. The principal benediction, as it is preserved by the Talmudists, was in this form: Blessed be the Lord our God, King of the world, Creator of man. Blessed

[a] Psalm xix. 5. See the Comments of Grotius and Geijer in Poli Synops. in loc.

[b] Ux. Ebr. l. ii. c. 7. Godwyn's Moses and Aaron, l. vi. c. 4.

[c] Godwyn's Moses and Aaron, l. vi. c. 4.

be the Lord our God, who hath created man after his own likeness, and the likeness of the image of his own original, and hath prepared for himself an everlasting building. Blessed be the Lord our God, Creator of man: the barren shall rejoice and exult in gathering her children into her bosom with joy. Blessed be the Lord our God, who maketh Sion to rejoice in her children. Make this pair to rejoice in the joy which thou gavest to thy creature of old in the garden of Eden. Blessed be the Lord our God, who maketh the bridegroom and the bride to rejoice. Blessed be the Lord our God, who maketh for the bridegroom and the bride joy and gladness, exultation, singing, mirth, jubilee, love, the paternal relation, peace and friendship. O Lord our God, let there be immediately heard, in the cities of Judea, and the streets of Jerusalem, the voice of joy and gladness, the voice of the bridegroom and the bride, the voice of mutual love from the bride-chamber, and children from the choir of their harmony, (*or* the voice of exultation in the bride-chamber is sweeter than any feast, and children sweeter than the sweetness of a song.) Blessed be the Lord our God, who maketh the bridegroom to rejoice with the bride.

This formulary was accompanied with the same benediction of wine as the celebration of the espousals, to which is added, in the more modern rituals, Blessed be the Lord our God, who gives joy and prosperity to the bride and the bridegroom. We confess unto the Lord that he is just, and that his mercy endureth for ever. Let joy be multiplied in Israel, and let sighing fly away[d].

[d] Ux. Ebr. l. ii. c. 12. Godwyn's M. and A. l. vi. c. 4.

The principal form which has been recited was called the Blessing of the bride and bridegroom, or the Blessing of the Marriage, and is, with the other formularies, ascribed to Ezra[e], by whom it may have been compiled from the more ancient usages and traditions of the Jewish Church, of which the original may be traced in the benediction of the elders at the marriage of Ruth[f], and in the history of the marriage of Tobias, and the various versions of the blessings contained in the latter history, which agree in establishing the nuptial benediction[g]. The Book of Canticles is also supposed to have been a nuptial song, divided into seven parts, one of which was recited upon each day of the nuptial feast[h]: and it has been thought, "that the Psalm cxxviii. was a form prescribed to be used at the blessing of their marriages, when they wished the new married couple all manner of happiness, especially a long life in peaceable times[i]." The Psalm xlv. was also a song of loves, and most interpreters conclude that it was composed upon the occasion of Solomon's marriage with the daughter of Pharaoh[k], although in its principal aim and direction its inspired author contemplated one greater than Solomon. The expressions of Solomon, in calling marriage a covenant of God[l], and of Malachi, in affirming that God is witness between a man and the wife of his youth[m], are indirect evidences of a religious ratification, of an appeal to the Deity in the solemnization of marriage.

[e] Ux. Ebr. l. ii. c. 12. [f] Ruth iv. 11, 12. [g] Tobit vii. viii. Ux. Ebr. l. ii. c. 13. [h] Shepherd on Common Prayer. [i] Patrick, Horne in loc. [k] Patrick in loc. [l] Prov. ii. 17. [m] Malachi ii. 14.

The nuptial benediction was not necessary, but it was usually observed, in the marriage of a brother's widow[n]. The history of the marriage of Ruth was sufficient to establish a precedent, from which the Jews required the presence of ten persons at the nuptial benediction, which was first recited by the eldest or most worthy, and was repeated during the seven days of the marriage feast, as often as guests arrived who were not present at a previous recitation[o]. It is recorded by Gaudentius, bishop of Brixia[p], (A. D. 400,) that when there was a marriage among the Jews, one of the sacerdotal order attended at the feast, to preserve regularity and decorum, and generally to direct the order of the entertainment, who was therefore called the ἀρχιτρικλινος, or ruler of the feast: and the only objection of Selden to this testimony is not to the fact or the record, but that he knew of no authority for supposing, that the ruler of the feast was necessarily of the sacerdotal order. Another argument for the presence of a priest at the Jewish marriages, and for the sacerdotal benediction of the bride and bridegroom, is drawn from the use of Psalm cxxviii. which is one of those Psalms which are called Psalms of Degrees, and are so called, in the judgment of some interpreters, because they were recited by the priests from an elevated situation, and adapted by them to the character or condition of the persons to whom they were addressed[q]. It is a record, perhaps, of more difficulty in the exposition than value in the application, that

[n] Ux. Ebr. l. i. c. 12. [o] Ibid. l. ii. c. 12. [p] Tractat. 9. recited in Ux. Ebr. l. ii. c. 11. [q] Gerhard, s. 459.

the king Joash had two wives, by a marriage which the priest promoted, or which he ratified by an act of sacerdotal benediction[r]. It is of more importance that Josephus and Philo Judæus make distinct mention of a sacrifice at the marriage. Josephus, probably with a remote allusion to the hire of the harlot, speaks of the interdicted marriage of the courtezan, (interpreting the original word in its classical sense,) the sacrifice at whose marriage[s] God would not accept, on account of her previous prostitution: and Philo speaks of the προτελεια, as affording a hope of the sacrificial celebration of marriage[t]. It is difficult to ascertain the exact meaning of these expressions, or to exhibit the nature of the sacrifices intended; but such expressions occurring in contemporary writers, must have a distinct and proper sense; they must denote some peculiar ceremonies of marriage, something more than the nuptial benediction, or the celebration of the nuptial banquet with benedictions. Our own expression of the solemnization of marriage is of obvious signification: the Greek phrase of δαισειν γαμους[u] has its specific allusion; and the Hellenistic phraseology of του θυσειν γαμους cannot but denote a sacrificial ratification of marriage; and does not such ratification in itself imply the presence of a priest?

[r] δοντος του αρχιερεως, quas ei locaverat Pontifex. *Hudson.* conjugium conciliante Pontifice. *Selden.* Joseph. Ant. Jud. l. ix. c. 7. cf. 2 Chron. xxiv. 3.

[s] τας επι τω γαμω θυσιας. Ant. Jud. l. iv. c. 8. s. 23. Cf. s. 9.

[t] ελπιδα και του θυσειν τους γαμους. in libr. περι της εις τα προπαιδευματα συνοδου. Opera ed. Pfeiff. vol. iv. p. 146.

[u] Eur. Iphig. in Aul. v. 715.

The modern Jews[x] profess to derive their rites of marriage from their remote progenitors, and especially

[x] A case of a singular description, connected with the Jewish rites of marriage, has been recently brought before the Lord Mayor. The beadle of Aldgate applied for an order of filiation against a Jew, whom he accused of deserting his bastard child. When the father was brought up, the mother maintained that the child was no bastard, as the defendant had married her before consummation; and she produced the ring, and challenged the man to say whether he had not put it on her finger, pronouncing those words which constituted them man and wife. The validity of such a marriage was denied; and it was asked, whether such marriages were usual among the Jews. The woman solemnly declared that a marriage in this form was binding, until a divorce took place: if it were not, she had been betrayed and seduced: she had acted in a conviction of the stability of the bond, which was the less doubtful, as one of the Goldsmidts had lately been married in this form. The defendant admitted that he had married the young woman as she had described, but contended that the form was unavailing. There were irregularities in the ceremony, under which it could not be recognized by the Jewish law. He had been disappointed in the young woman, or he would have completed the ceremony before the High Priest, and have thus put the legality of the marriage beyond all question. He now resisted all claim but that of the child, which, whether a bastard or not, the Jewish law obliged him to maintain. Under these circumstances the question of the legality of the marriage was submitted to the High Priest, from whom the following communication was received:—"The solemnization of marriages among the Jews is regulated by a code of laws, which impose certain ceremonies to be performed, and blessings to be said under a canopy, by a person properly qualified and authorized for this purpose. Parties, however, surreptitiously contract themselves, by the man putting a ring on the finger of the woman in the presence of witnesses, and declaring its purpose: but such marriage is not only disreputable, but occasions much inconvenience, as its validity may be questioned; and the law considers the wife of such formation in the same light as an unclean woman. Her

from the precedent of the marriage of Tobias. The principal ceremonies are, the bathing of the bride on

claim to maintenance is likewise subject to much question, although there is none for that of her children: and neither the man nor the woman can marry any other person, unless a regular divorce has been executed between them. Thus, though the ceremony is incomplete, and liable to much dispute, they must with respect to other connexions be considered as man and wife."—Sir James Shaw, who sat with the Lord Mayor upon the occasion, differed from the High Priest in his view of the case, which he considered to be analogous to the familiar case of marriages in Scotland, where the mutual declaration of assent forms an indissoluble bond; and he did not see how the defendant could be called upon to maintain his bastard child, under such circumstances as appeared to him sufficient evidence of legitimacy. The Lord Mayor also considered the ceremony that had taken place to constitute a *bona fide* contract, which, whatever might be the operation of the Jewish law, he could not disturb. The parish should proceed against the defendant in the usual way, for having deserted his wife and child; and measures would speedily be taken to punish the father, for having attempted so gross a deception.—See Times, Aug. 13, 1824. According to this statement, the validity of the Jewish marriages depends not on the simple contract, which may be surreptitious, incomplete, and subject to dispute, which conveys no right of maintenance to the wife, and is contrary to the law of the Jews; but it depends on certain ceremonies and blessings, performed by a person properly qualified and authorized. Whether the Jews will or will not acquiesce in this arbitrary interference of the civic authorities in interpreting the operation of their law, it is certain that this flagitious case not only affirms the necessity of an authorized solemnization of marriage among the Jews, but suggests new ground of objection to the doctrine, that marriage is a civil contract and nothing more, and to the expedience of extending the privilege of marrying by a form which is not defined by the laws, which is liable to the misrepresentation of one party and the misapprehension of another, and of which the proof is not facilitated by an authenticated registry.

the day before the marriage; the mutual presents of the bride and bridegroom; the delivery of the instruments of marriage; the adorning of the bride; and the solemn procession, with music and company, of the bride and bridegroom to the place of union and benediction, which is a canopy, of which the four pillars are supported by four boys, and which is called Chuppah. On the arrival of the bridegroom under this canopy, there is a general acclamation, of Blessed is he who cometh: and at the end of the ceremony wheat is thrown upon the heads of the bride and bridegroom, with a recitation of the primitive blessing, Increase and multiply. The ceremony of benediction proceeds in this form: The bride stands on the right hand, with her face towards the south, and the rabbi who officiates takes the end of the tippet which the man has round his neck, and places it on the head of the woman; and afterwards, taking in his hand a glass full of wine, he pronounces the blessing of the bride and bridegroom, which has been already recited, and offers to them the wine as of old time. He then places a ring of gold of approved fineness on the finger of the bride; and calling for another cup of wine, pronounces the ancient benediction of the marriage, and drinks to the parties of the wine, directing the bridegroom to pour the wine of the espousals upon the ground, in token of the destruction of Jerusalem; in commemoration of which it is usual in some places to cast ashes upon the bridegroom's head, and to cover it with a piece of black cloth. The marriage feast ensues, which is protracted for eight days. In Italy, when any person is invited to honour the marriage feast with his pre-

sence, he replies, Mazal Tob; signifying that he wishes a happy issue to the marriage; and the same words are engraved upon the wedding ring[y].

The general celebration of marriage among the Heathens and the Jews with religious rites, affords a strong testimony of the sense and opinion of mankind in favour of the religious ratification of marriage: and as those rites existed, and were in common use, before the time of our Lord, the proper method of ascertaining the authenticity of the Christian practice will be, to enquire, not what our Lord commanded, but what he did not forbid. He was himself present at the solemnities of the nuptial feast, and gave to them the sanction and authority of his sacred presence: he used, in his parables, various allusions to the ritual of marriage, to the procession to conduct the bride, the use of lamps, the approach of the bridegroom, and the celebrity of the nuptial feast: and while he condemned the common traditions and superstitious practices of the age, he was so far from making any exception to the rites of marriage, that he gave to them new sanctity, in appropriating them in the description of himself and his Church. His apostle, St. Paul was earnest in upholding the validity and obligation of marriages which had been celebrated with heathen rites, and suffered not the dissolution of the bond[z] which had been thus contracted, although he restricted the disciples, after their conversion, from marrying with the unbelieving[a],

[y] Gerhard, s. 460. Shepherd on Common Prayer. Godwyn's Moses and Aaron, l. vi. c. 4.

[z] 1 Cor. vii. 2, 10, 11.

[a] 1 Cor. vi. 15. 2 Cor. vi. 14.

and required them to marry only in the Lord[b]. This rule is generally interpreted of marriage among Christian believers; without, however, excluding the rites which were proper to marriage, which have been attributed to apostolic appointment and tradition, and are known to have prevailed in the Church in the second century[c]. It is the common assertion of the writers who have detailed the forms of the heathen marriages, that as they did nothing without taking the auspices, so they especially observed them in their marriages: and it appears to be a just and necessary conclusion, that when Christians were required generally to do all which they did to the glory of God, and in the name of the Lord Jesus Christ[d], or in the character of his disciples, they would hardly enter upon marriage without some religious observance, in which the required community of their faith enabled them to agree; and the conclusion is strengthened by the circumstance, that the nations in their unconverted state were accustomed to a religious solemnity and ritual of marriage.

It would be vain to pretend that it is a clear or unexceptionable argument, which the Scriptures alone supply in favour of the rites of marriage, or indeed of any rites, without reference to the previous and the subsequent forms of celebration, of which the proof must be collected from other authorities, and the reason is approved by the primitive and catholic practice. The Scriptures afford no evidence of the

[b] 1 Cor. vii. 39. [c] Comber on the Office of Matr. Introduction. [d] 1 Cor. x. 31. Col. iii. 17.

ritual celebration of Baptism or the Supper of the Lord, which no man has had the temerity to censure or deny. The opinion that the ratification of marriage among Christians with religious rites is derived wholly from the prevailing customs of the heathen, should not be implicitly received, or allowed to justify any inference prejudicial to the rites of marriage, without mature consideration of the circumstances of the case, that there was nothing absolutely unlawful in the rites themselves, and that it may have been necessary to comply with them to secure the civil advantages of the marriage, and prudent to depart from them only by degrees, and with the most cautious circumspection. It is thus that Tertullian affirms at once the sacrificial forms of the heathen marriage, and approves the compliance of Christians with those forms: In respect of offices of private and public solemnities . . as espousals, as marriages . . I should think that no danger is contracted from the breath of idolatry which occurs in them. It is necessary to take into view the occasions for which the office is required. I think that the occasions are pure in themselves, because neither is the ring nor the union of marriage descended from the honour of any idol. . . And God does not prohibit the celebration of marriage any more than the imposition of a name. But sacrifices are accommodated to marriage. If the nature of the office and the discharge of my labour depends not on the sacrifice, but on the occasion upon which I am called, what then? Do as you please. I wish indeed that we had power not even to see the things which it is not lawful to do. But since the evil spirit of idolatry

encompasses the age, we are at liberty to be present on occasions in which we render service, not to the idol, but to man[e]. This may account for the mixed character of the ceremonies which prevailed in the primitive Church, of which some were chiefly of heathen origin, and others had the better authority of Scriptural allusion. The principal ceremonies consisted in the dress and ornament of the bride and bridegroom; the lamps which they carried in the public procession to the temple; the crowns which they wore in token of their triumph over sinful passion, and which were put on by a priest; the ring; the veil; the procession to conduct the bride; and the form of dower and the nuptial banquet[f]. The principal point which it is necessary to ascertain is the sacerdotal benediction; the use of sacred rites, and the presence at the marriage of a minister of the Church, of which the traditionary evidence is copious and unbroken from the apostolic age, originating in words of all but apostolic language.

It is the rule of the apostolic father, Ignatius, that it becomes men and women that are marrying, to form the union with consent of the bishop[g], that the marriage may be according to the Lord, and not in compliance with passion. Selden objects that the genuineness of the epistle is doubtful, and that it proves only that the marriage should be contracted in compliance with the divine law, of which the bishop was the guardian and interpreter. The great purpose of the appearance before the bishop, and of

[e] De Idolatr. s. 16. [f] Gerhard, s. 461. [g] μετα γνωμης του επισκοπου. Ad Polycarp.

obtaining his consent, was to prove that both the parties were Christian: but it may be asked, whether the bishop would have neglected so interesting an occasion of praise and benediction in connexion with the divine ordinance and rule of marriage? Baronius is bold in affirming that marriage was not then contracted without the presence of a priest, and observes the correspondence of the apostle's language, of marrying only in the Lord, which he interprets of a celebration of marriage in conformity with the laws and rites of the Church delivered by the apostle[h]. Is it impossible that this rule of Polycarp was the remote origin of the publication of banns?

In the Protevangelion of James, the early forgery of an Hellenist, deeply acquainted with the rites of the Jews, and bearing indirect testimony of the contemporary practice of the Christian Church, Joseph is charged with a clandestine marriage, and not bowing his head under the mighty hand, that his seed might be blessed, as Fabricius interprets his words, by a solemn and sacerdotal benediction[i].

Soter, bishop of Rome, (A. D. 174.) ordained that no wife should be esteemed lawful whom the priest had not blessed according to the institution[k].

Athenagoras (A. D. 178.) affirmed of the Christians, that each esteemed her to be his wife, whom he married according to the laws established among them[l].

[h] Ux. Ebr. l. ii. c. 28. [i] Cod. Apocr. Nov. Test. P. I. p. 101. [k] Platina in Vit. Soter. apud Gerhard.

[l] ὑφ' ἡμων τεθειμενους λογους. Legat. pro Christ. s. 33. Other copies read ὑφ' ὑμων, i. e. the Romans; and hence is constructed an argument for the validity of marriages contracted before conversion.

Clemens of Alexandria, (A. D. 192.) in reflecting upon the women's use of false hair, asks, On whom does the presbyter lay his hand? Whom does he bless? Not the woman thus adorned, but the borrowed hair, and, through that hair, the head of another[m]. This passage may or may not relate to the nuptial benediction: the reflexion is upon married women; but the benediction may have been received at other times than their marriage.

That the ancient Church in general, and the African Church in particular, were always wont to celebrate marriage by the solemn benediction of the clergy, is the assertion of the learned Gothofred[n]: and Selden[o] admits that the use of the sacred priesthood in the celebration of Christian marriages, is undoubtedly recognized in the following passage of Tertullian, the first of the Latin fathers: (A.D. 209.) Whence shall I find words to express the felicity of that marriage, which the Church conciliates, and the oblation confirms, and the benediction seals, and the angels publish, and the Father ratifies[p]. Selden endeavours to explain away the obvious meaning of this passage; and argues, that the Church does not mean the clergy, distinct from the laity; that it does not necessarily prove the necessary, or even the customary, use of any minister, or any sacred rites at the marriage, and that, although the oblation may mean the Eucharist, it is not necessary to suppose more than that the Eucharist preceded or followed the marriage. Gothofred on the contrary maintains,

[m] Pædagog. l. iii. c. 11. [n] Bingham's Antiq. b. xxii. c. 4.
[o] Ux. Ebr. l. ii. c. 28. [p] Ad Ux. l. ii. s. 9.

that the Church promoted the marriage, inasmuch as men commonly asked wives of the clergy, consulted them upon their marriage, declared or avowed their marriages before them, and ratified them by their benediction. He proceeds to shew, that in this passage there is a distinct allusion to the five rites of heathen marriage, which may thus be compared with those in use in the Christian Church, according to the representation of Tertullian:

1. { The Proxenetæ conciliating the marriage;
   { The Church or clergy conciliating the marriage.

2. { The offering of the kiss and gifts of espousal;
   { The oblation of prayers with the Eucharist.

3. { The signing of the instruments;
   { The obligation of the sacerdotal benediction.

4. { The testimony and presence of witnesses and friends;
   { The publication, faith, and testimony, of the angels.

5. { The consent of parents to the marriage;
   { The ratification of the heavenly Father[q].

The argument of Gothofred is confirmed by other passages in the writings of Tertullian: he not only calls marriage the blessed connexion, or the connexion of blessing[r], but he says, that with the Christians, secret or clandestine marriages, which are not publicly avowed before the Church, are liable to be condemned as fornication and adultery[s]: and again, in his treatise of Monogamy, he asks, Who art thou,

[q] Bingham's Ant. b. xxii. c. 4. [r] De Pud. s. 19. [s] Ibid. s. 4.

that demandest a second marriage of them to whom such a marriage is unlawful? For the bishops, the presbyters, and the deacons, and the widows of the Church, whose society thou art rejecting, are all monogamists, and have been but once married: and shall they give husbands and wives, openly as they do morsels, to every one that asketh, and join you together in the virgin Church, the only spouse of the one Christ[t].

Selden objects, that if this passage is to be understood of the nuptial benediction, that benediction was the act of the widows as well as of the clergy; but it is answered, that the widows only gave counsel in conciliating the marriage, the clergy added their benediction to ratify the marriage[u]. Selden recites the exposition of Gabriel Albaspinus, Bishop of Orleans, who, in his observation on the passage, maintains, that nothing was required besides advice on the propriety of the marriage, and the power of carrying it into effect. Selden nevertheless admits, that in the beginning of Christianity among the Gentiles, Christian rites and ministers had their place, and succeeded those of the Gentiles: but he contends, that there is no evidence that such rites were then generally received; that the clergy had any office beyond the benediction, and the administration of the Eucharist; that their presence was required for the prevention of clandestinity, and according to the common practice of attaching religious rites to civil acts[x]. This is, in fact, to concede the point in

[t] De Monog. s. 11. [u] Bingham, b. xxii. c. 4. [x] Ux. Ebr. l. ii. c. 28.

question, that there was, from the beginning of Christianity, a religious ratification of marriage; and more than this could not be expected in the second century, of the rites of which the evidence is brief and obscure, and when the validity and civil effect of marriage depended on the law of the empire, not on the law of the Church, and when the feeble discipline of persecuted Christianity could only betray itself in censures of transgression which it could not punish, and canons of discipline which it could not enforce.

There are numerous testimonies of the practice of the fourth century.

Sylvester (A.D. 320.) ordained, that every clergyman should be the husband of one wife, who had received sacerdotal benediction [y].

Lactantius (A. D. 303.) bears testimony to the ancient institution of ratifying covenants of marriage, by the sacrament of fire and water: alleging, as a reason of the practice, that the offspring of animals are by heat and moisture formed into bodies, and quickened into life [z].

Ambrose (A.D. 374.) records the practice of the Churches of Italy: When marriage ought to be sanctified by the nuptial veil and benediction, how can that be called a marriage where there is no harmony of faith [a].

Gregory of Nazianzum, (A.D. 370.) in describing the marriage of Olympias, says, that a great number of bishops attended, and that he himself was present

[y] Damasus in ejus vita, apud Selden. [z] De Orig. Err. l. ii. c. 10. [a] Ep. 70. apud Bingham.

in heart and will, celebrating the festival, and joining the right hands of the young couple together, and both of them to the hand of God. The joining to the hand of God can only mean the benediction[b].

Augustin (A. D. 398.) thought that the priest should not be a procurator or solicitor of marriages; but that when the parties themselves had agreed upon the marriage, the priest should at their request attend to confirm the contract and pronounce the benediction[c]. He makes mention also of the nuptial tables, which have been interpreted of offices of marriage[d].

Basil (A. D. 370.) calls marriage, the yoke or bond which men take upon themselves by sacerdotal benediction[e].

Chrysostom (A.D. 398.) pronounces it necessary to call for the priest, and with prayers and benedictions to bind the unanimity of marriage; and after the example of Abraham's steward, who used the mediation of God, to fly when a wife is sought unto God, who is not ashamed to be the maker of the marriage[f].

Siricius (A. D. 390.) considered that there was a kind of sacrilege in the violation of that benediction which the priest gives to the woman who is about to marry[g]. Selden admits that this is a record, that the sacerdotal benediction of the espousals was then a common practice; and is it probable, that the

[b] Ep. 57. apud Bingham. [c] Possid. vit. Augustin. c. 27. Ibid. [d] Comber's Off. of Matr. [e] ὁ διὰ της ευλογιας ζυγος. Hom. 7. in Hexaemer. apud Bingham. [f] Hom. 48. in Gen. apud Bingham. Opp. tom. viii. Ser. 15. apud Comber. [g] Ep. I. ad Himer. apud Bingham.

espousals should be blessed, and that the more important business of the marriage should be passed over without benediction? Or may not the benediction of the espousals have been a ritual ratification of the marriage? This was the common practice of the age.

It was the rule of the fourth council of Carthage, (A.D. 398.) When the bridegroom and the bride are to be blessed by the priest, let them be presented by the parents and the paranymphs[h].

In the fifth century the Decretals of Innocent I. (A.D. 410.) speak of the sacerdotal benediction of the espousals as a common practice[i]; and Synesius, his contemporary, in the account of his own marriage, says, that God, and the laws, and the sacred hand of Theophilus, gave to him his wife; and he therefore declares before all men, that he will not desert her[k]. In this century also appeared an anonymous refutation of the heresy of the Prædestinati, of which the author, in arguing upon concupiscence, remarks, Choose one of two things; either the birth of man is good and concupiscence is good, or marriage is evil and concupiscence is evil. Amend, therefore, the rules of the Church; condemn the priests throughout the world, who bless the beginnings of marriage, consecrating the parties, and uniting them in the mysteries of God. Selden admits this to be a clear testimony of the nuptial benediction, and of the sacred rites attached to marriage in the use of Christians. He only con-

[h] Apud Gerhard. [i] Ux. Ebr. l. ii. c. 28. [k] Niceph. Hist. Eccl. l. xiv. c. 55. apud Gerhard.

tends, that the priest was not necessarily present at the contract of marriage: the present argument seeks no more, than to establish the continual prevalence of the religious ratification of marriage: and from this period Selden allows the frequent and distinct mention of a sacred ritual of marriage: ἱερολογιας της τελειας sive της γαμικης[l].

In the beginning of the sixth century appeared the decree of Hormisdas, the pope: (A.D. 510.) Let none of the faithful, of whatever condition he may be, contract marriage clandestinely, but let him marry publicly in the Lord, receiving the benediction of the priest. There are writers of eminence, who understand the nuptial vow, which is mentioned in this age, in the writings of Justinian, of the sacerdotal benediction of marriage[m]; but Selden is so far from coinciding in their opinion, that he strenuously labours[n] to disprove the evidence contained in the Novel of Justinian, of the ratification of marriage with sacred rites. He admits the mention of the church as the place, and the clergy as the witnesses, of marriage, but he restricts the necessary testimony to any of the clergy, and to the marriage of men in the middle ranks of life. In the higher ranks the Novel requires the dowry, with all other things appropriate to honourable station. In the middle ranks it requires that the parties should come to the house of prayer, should communicate with the guardian of the most holy Church, should obtain the testimony of two or three of the most reverend

[l] Ux. Ebr. l. ii. c. 28. [m] Bingham, b. xxii. c. 4. [n] Ux. Ebr. l. ii. c. 29.

clergy, that they, the bridegroom and bride, were married at a specified time in the house of prayer, and that the record should be preserved in the archives of the Church. It requires some subtlety to dispute so plain a testimony; a testimony as plain as a modern register of marriage, and implying in the place, the witnesses and the registry a sacred act. The same form is not required where there is a dowry; and a more simple form of contract is allowed to the lowest class of the people, which at the time was so degraded, that no particular rule for the celebration of their marriages could be expected from the imperial legislators. In respect of the highest class there is the testimony, not of legal provisions, but of historical narrative, that their marriages were usually celebrated by the clergy. John, the patriarch of Constantinople, gave the crowns, and administered the sacred rites, at the marriage of the emperor Mauricius to Constantina; (A.D. 580.) as was usual[o] in the case of those who held the pure and uncorrupted faith. His successor, Cyriacus, also married Theodosius, the son of the emperor Mauricius, to the daughter of Germanus, a patrician; and in the following century his successor, Sergius, married the emperor Heraclius to Eudoxia.

In the sixth and seventh centuries flourished Isidore of Seville, who labours under the imputation of forging the Decretal Epistles and other writings, to which he ascribes a primitive name and authority. On the supposition of the fact, that these writings

[o] ὡς συνηθες. Theophyl. Simocet. Hist. l. i. c. 10. Ux. Eb. l. ii. c. 24. Comber, Office of Matr.

were forged by Isidore, they will be at least allowed to describe the practice of his age, and of that immediately preceding, or the fraud would have been instantly and directly exposed. In the Epistle which bears the name of Evaristus[p], bishop of Rome, (A.D. 97.) it is prescribed among other requisites of marriage, As we have received by tradition from the fathers and the holy apostles, and their successors, there is no lawful marriage, unless the bride at the proper time, be sacerdotally blessed, as is the custom, with prayers and oblations by the priest, and attended and accompanied by the paranymphs, as is the custom; otherwise it is not a marriage, but adultery and concubinage, and rather whoredom and fornication than lawful matrimony. This Epistle is recited in various writings of the ninth century; and upon its authority Evaristus has sometimes the reputation of being the first to pronounce the marriage incestuous which the priest was not present to consecrate, of requiring marriages to be publicly and lawfully made, and of interdicting cohabitation before the sacerdotal benediction. But the same or similar rules are found in the decrees of the pope Soter, and of the first council of Carthage, which have been already recited, and with the spirit of which, the letter of Evaristus exactly coincides. The Decretal Epistle of Callistus I.[q] also affirms, that there is no lawful marriage, without the deed of dower and the benediction of the priest. If these are indeed the inventions of Isidore, they are valuable testimonies of the practice of the sixth century: if they are the

[p] Apud Gerhard. [q] Ux. Ebr. l. ii. c. 29.

writings of an earlier age, they confirm the evidence of the sacerdotal benediction of marriage. Isidore himself, in his authentic writings, does not scruple to assert the tradition of this practice from the very original institution of marriage: That persons are blessed by the priest in the union of marriage, he says, was done by God, in the very first union of man; for thus it is written: God made man; in the image of God made he him; male and female made he them; and blessed them, saying, Increase and multiply. This is now done in the Church, after the example of what was then done in paradise. He afterwards speaks of the use of bridemaids and veils during the ceremony, of the benediction, of chaplets, and the use of the ring; and makes the three nuptial benefits to consist of issue, fidelity, and the sacrament; understanding under the latter term, the indissolubility of the union, and the apostolical representation of the mysterious unity of Christ with his Church[r]. It is of importance to add, that Isidore probably adverts to the words of Augustin, concerning the nuptial tables, which he calls, the sacerdotal tables; and from a collation of the passages, it is reasonable to infer, that Augustin understood by the nuptial tables, not any civil instruments between man and wife, but the office of matrimony in use among Christians, celebrated by the priest, and contained in the ecclesiastical tables[s]. Such a form is extant in the Sacramentary of Saint Gregory, which professes to have been written in the seventh cen-

[r] Div. Off. l. ii. c. 19.

[s] Comber, Off. of Matr. General Exhortation.

tury, and which, as there is just reason for believing, was compiled from offices of a more ancient date[t]. It was in this century also, that Theodore, Archbishop of Canterbury, (A.D. 680.) ordered how the bride and bridegroom should be blessed; viz. that they should receive benediction from the priest, with prayers and oblations[u].

In the eighth century, Egbert[x], Archbishop of York, (A. D. 740.) published the decree of the fourth council of Carthage, concerning marriage; and at this period, and at the instance of the kings, Pepin and Charlemagne, Hittorpius judges the Ordo Romanus to have been compiled, which contains an express and excellent formulary for blessing the bride[y].

In the ninth century, Hincmar, Archbishop of Rheims, (A. D. 860.) and with him all the bishops of France and Germany, in a letter addressed to the emperor, condemn the opinion, that marriage might proceed from impious concubinage; and, adverting to the divine benediction on the first marriage, they declare, In imitation of that marriage, the holy Church has anciently, solemnly, and reverently, taken care of those who are in the Church, as in the paradise of God, and are to be joined together in marriage, uniting them with the divine benediction and the celebration of mass: and this honourable and religious union, commencing under the authority of God, and confirmed by his benediction, has been preserved in a just order, even by natural law, and

[t] Comber, Off. of Matr. Introduct. See Appendix, No. III.
[u] Ux. Ebr. l. ii. c. 28. [x] Ibid. [y] See Appendix, No. III.

among the Gentiles, who have not received the law, and possess not the knowledge of God. It was about the same period, that Pope Nicolas, in his Epistle addressed to the Bulgarians, distinctly describes the Romish forms of espousals and of marriage. Of the latter he says, The bride and bridegroom enter the Church of the Lord with the oblations, which they should offer unto God, by the hand of the priest; and thus they receive the benediction and the celestial veil. It was in this century also that the laws of Charlemagne and Lewis the Pious, not only ordained the use of the sacred benediction, but required that the very form of the contract should be made in the Church, under the administration of a presbyter. In conformity with this law, Ethelwolf, king of England, was married to Judith, daughter of Charles the Bald; and the practice thus, according to Selden, received into the Western empire, was spread abroad in the neighbouring states[z].

The tenth century produced the constitution of Leo the Philosopher, requiring the same religious ceremonies to be observed in marriage as in adoption: As antiquity was negligent of the ceremonies of adoption, it appears also to have been negligent of the perfect constitution of marriage, and to have suffered it to be contracted without the benediction now received. The reason of this dispensation may have been known to the ancients; but it does not become us to be so negligent, since, by the divine grace, affairs are now directed to a more honourable

[z] Ux. Ebr. l. ii. c. 29.

and holy state of life. Therefore, as we have ordained that adoption be celebrated with sacred prayers, we now command, that matrimony be ratified by the testimony of a sacred benediction; and we wish it to be understood, that nothing which shall be contracted without it shall be called matrimony, and that no persons otherwise united shall enjoy the rights of matrimony[a]. The negligence of antiquity may be understood of heathen antiquity, which is most naturally opposed to the better state introduced by the divine grace. The laws of the Saxon king, Edmund, were coeval with the imperial law of the East, and ordained that a priest should be present at the making of espousals, who, by giving to the parties the divine blessing, might assist their sacred confederation in all holiness[b].

In the eleventh century, the patriarch of Constantinople refused to administer the sacred rites at the marriage of Constantine and Zoe, (A. D. 1036.) because it was the third marriage of the empress; and they were performed by an ordinary priest[c]. In the latter part of the century, Alexius Comnenus ordained, that those espousals only should have the force and effect of matrimony, which were ratified by the sacred benediction; for it is absurd to suppose that there is no value in the consecration of marriage, and the accompanying prayers, and that God is not present with the persons who are united. That only is true marriage, and has the power of true marriage, which is completed with the sacred bene-

[a] Gerhard, s. 400. Ux. Ebr. l. ii. c. 29. [b] Comber, Off. of Matr. Introd. [c] ἱερατελεστικὰ γαμικὴ. Zonaras apud Gerhard.

diction, and the presence of God with the persons who are united, and in confirmation of their union. Other espousals have only the effect of espousals. It was also the will of Justinian, that marriage should be contracted with an attestation before the guardian of the Church[d]. The law of the West in this century again was conformable with the law of the East: and in the council of Winchester (A. D. 1076.) it was declared to be no less than prostituting a daughter, to give her in marriage without the blessing of the priest[e].

In the twelfth century Peter Lombard introduced the doctrine of the seven Sacraments, in which marriage was included; and in the council of Lateran, under Alexander III. (A.D. 1179.) the general practice of the age is recognized in the prohibition to exact any fee for the sacred benediction[f]. It was at this period also that the learned Balsamon, (A. D. 1180.) left his record of the custom of the Eastern Church, that, after the example of the first marriage, the representatives of God come forth unto the persons who are to be joined together, and ratify their sacred covenant by the offering up of holy prayers[g].

The general admission, that the celebration of

[d] Nov. 74. c. 4. apud Gerhard. This imperial rule confirms the observation which has been made on the practice of the fourth and fifth centuries, that the benediction of espousals was equivalent to the ratification of marriage. In the constitutions of Alexius, patriarch of Constantinople, (A.D. 1030.) ὁ ευλογων γυναικα, οἱ ευλογουντες ἱερεις, ὁ τους δευτερους γαμους ευλογων ἱερευς, are common expressions for the celebration of marriage. See Ux. Ebr. l. iii. c. 32.

[e] Comber, Off. of Matr. Introd.

[f] Gerhard, s. 461.

[g] Comber, Off. of Matr.

marriage in the Church was ordained by Innocent III. in the fourth council of Lateran, (A. D. 1215.) supersedes the necessity of any further prosecution of the history of the religious ratification of marriage.

In the view which has been taken of the practice of the Church for the first twelve centuries, it would be vain to pretend, that all the several testimonies are equally clear and distinct; but taken together, and explained in dependence upon each other, they form a strong and conclusive argument. They leave no period for the introduction of religious rites, no period in which the religious ratification of marriage was unknown. The Jewish rites were retained by the Jews; and the heathen rites, purified from what was properly heathen, or celebrated for a civil purpose, in compliance with the existing law[h], were adopted by the converts from heathenism, eventually obtained the sanction of Constantine, and in the use of the ring and the bridecake, have not yet been superseded[i]. The writers of the first ages were too usefully occupied to dwell upon circumstances, which were familiar to their contemporaries, but of which it is difficult, in the present day, to form a just conception. There was then a distinction between the espousals and the marriage, which no more prevails; and the benediction of the espousals became in process of time, equivalent to the ratification of marriage, to the offices of which, in the primitive liturgies, it gave the name and title[k]. The opinions of many of the early fathers were too

[h] Tertull. De Idol. s. 16.

[i] Ux. Ebr. l. ii. c. 24, 25, 28.

[k] See Appendix, No. III.

friendly to monastic life to allow them to expatiate upon the ratification of marriage, the solemnities of which were often precluded by the disputed lawfulness of second marriages[l]. For a certain period the empire was heathen, and the validity of marriage depended on the imperial law, not on religious rites or ecclesiastical canons. Of the marriage of the heathen the Church could take no cognizance; the marriages of the believing with the unbelieving it could not sanction and it could not dissolve: and in many parts the Church itself was so imperfectly settled, that the ratification of marriage, as in the remote colonies of the present day, was obviously, and from the necessity of the case, impracticable. Notwithstanding these difficulties, there is a body of traditional evidence, which, taken together, leaves no doubt that marriage was usually, if not universally, celebrated with religious rites; which proves the general practice, if it fails of establishing the absolute necessity, of the sacerdotal benediction, to which the captious and negative objections of Selden are principally directed[m]. When the empire became Christian, the law of marriage, as a pontifical privilege, was committed to the Church; and in the ignorance

[l] See the Canon of the Council of Neocæsarea, which was to this effect, in Bingham's Antiq. b. xxii. c. 4. s. 2.

[m] The common practice of this learned man is to recite an authority, to which he annexes a comment: Nec tamen inde omnino evincitur, ipsi contrahendi actui, necessario interfuisse ministrum. Cf. de Jure Nat. et Gent. l. v. c. 7. where he admits upon the authority of Tertullian, which, in the Ux. Ebr. he labours to elude, vetustum etiam in Christianismo morem de solennibus conjugiorum quorumcunque sacrisque benedictionibus.

and barbarism which succeeded, the rites which wanted the authority of civil law gradually fell into disuse, until the more zealous emperors undertook to reform the abuses which had crept into the discipline of the Church, and especially in the contract of marriage without sacerdotal benediction. It was Charlemagne who enacted in the West, that marriage should not be celebrated without sacerdotal benediction, accompanied with prayers and oblations; and Leo the Wise revived the ancient practice in the East, which has never been superseded. Selden and Gothofred are agreed, that from this period the necessity of the sacerdotal benediction was established by law. The point on which they differ is, that Selden affirms that this was the primary and original establishment; Gothofred maintains that it was the revival of the ancient practice[n]. The evidence which has been alleged, proves that there was nothing new in the constitution of Leo: it agrees with the rules of the bishops of France and Germany, of the pope, and of the king of France, in the ninth century: it agrees with the papal and imperial law of the sixth century, and the usual practice of the imperial court: it agrees with the very numerous testimonies of the fourth century; and with the doctrines of Tertullian in the third, of Athenagoras in the second, and of Ignatius in the first and apostolic age.

If there is any value in the authorities which have been recited, the religious ratification of marriage has the most ancient and the most continuous evidence of tradition in its favour, and is authenticated by the

[n] Bingham's Antiq. b. xxii. c. 4. s. 3.

use of all men, in all ages, and in all places. In the patriarchal age, among the barbarous and polished nations of antiquity, among Greeks and Romans, Jews and Christians, marriage has been always ratified by ceremonies, more or less distinct, of religious reverence: and while this general concurrence proves the assent of man's reason to the propriety of the practice, there is nothing in the whole volume of the Scriptures, by which it is opposed; there is much by which it is authorized and approved. The appeal to the Deity, which is implied in the religious ratification, agrees with the doctrine of the divine institution of marriage; and it is the most convenient form of securing in practice the public and irrevocable consent of the parties. The reasons which Gerhard° assigns for retaining the practice, are worthy of all attention. These reasons are, 1. the example of God in the institution of marriage: 2. the apostolical precepts, both general, to do all things decently and in order, in the name of Christ, and to the glory of God; and particular, to marry only in the Lord: 3. the opportunity of instructing the parties in the dignity and the duties of marriage: 4. the advantages resulting from the ratification of the marriage, in the presence of God and of his Church, and from public prayer, in hope of the divine benediction: 5. the antiquity of the institution, and the practice of all ages, without excepting, 6, the suffrages of the heathen. The first of these reasons, the divine example in the primary institution of marriage, is a point, upon which ancient

° S. 462.

and Lutheran writers frequently insist; and it is reasonably supposed[p] to be the original of a tradition, than which none is more ancient; of a practice, than which none can be more properly called universal; of a tradition so coextensive with the reason of man, and with his natural sense and feeling of propriety, as to have no exception but in nations the most barbarous, and as can be traced to no source but the Author of our being, our affections, and our understanding, who hath formed our hearts in correspondence with his will, that there shall be a religious ratification of marriage, a public acknowledgment of his benevolent provision for the good of mankind.

[p] Comber, Off. of Matr. Introd.

SECTION II.

The Religious Ratification of Marriage in England.

IT has been the common error of writers who maintain, that marriage is a civil contract and nothing more, to misrepresent the true origin of its religious ratification; asserting that marriage was originally a civil contract, and that a sacred character and a religious solemnization were surreptitiously engrafted upon this civil contract, by an ascendant hierarchy, but not universally or authoritatively prescribed before the fourth council of Lateran, held under Innocent III. A.D. 1213. In opposition to this assertion, it has been shewn, that marriage originated in the divine institution, and not a civil contract; that it is called in the Scriptures of the Old Testament, a covenant of God; that certain of the Psalms, and the Song of Solomon, were in fact nuptial songs; and that marriage was celebrated with sacrifices among the Jews; that rites of marriage were common among the heathens; that the New Testament attaches a peculiar sanctity to marriage, and delivers rules, which do not oppose, if they do not command, its religious celebration; and that, from the earliest ages of Christianity, as far as a just judgment can be formed from the scanty records of those ages, marriage has been always solemnized in the Christian Church with sacerdotal benediction. There is such a perpetual and catholic tradition of its religious character, as may justify the conclusion that it is agreeable to the natural sense

and reason and religion of mankind, to acknowledge a certain holiness and dignity in the state of marriage, and not to enter upon it without public and solemn prayer for the aid and blessing of God.

The opinion has, from time immemorial, been established in England, that the civil contract requires to be ratified and made effectual by a religious ceremony. On this principle deeds of settlement are valid, not in themselves, but in contemplation of a marriage to be celebrated, without which they are void and of no effect: the contracts of a former age *per verba de præsenti*, were not only liable to the compulsory celebration, but derived in many respects their chief validity from the actual celebration in the face of the Church: and in the time when espousals were distinct from marriage, they also were a religious act; and it was customary to receive the dower[a], in the presence of the priest, at the door of the Church, as is plain from Chaucer's relation of the Wife of Bath, that

> Husbands at the church door she had five.

The minds of men have thus been trained into a voluntary and habitual conformity with these provisions of religion and of law; and the practical use of a merely civil contract has been almost or alto-

[a] Ux. Ebr. l. ii. c. 27. Although the espousals and marriage are now combined in one office, is there not a vestige of the ancient custom retained in the neglected direction of the rubric, requiring that part of the service which relates to the mutual stipulation or espousals to be celebrated in the body of the Church, from which the parties are to proceed to the Lord's Table, reciting the nuptial Psalm?

gether rejected or unknown. The great body of the people have no conception of marriage which is not celebrated in the Church; and all conditions of men agree in declaring their respect for the institution; the rich by their liberal remuneration of the service of the minister, the poor by their humble thanks for his ministration. In the extravagant passion for clandestinity, which called for the provisions of the Marriage Act, the form and semblance of a religious ceremony were observed: in the time of the Usurpation that ceremony was superseded, not by the will of the people, but by the order of the usurping power: at the time of the Reformation the Romish missal was succeeded, without any interval or intermission, by the revised office of the Protestant Church. The minds of our forefathers were always impressed, and they have from age to age impressed the minds of their children, with a sense of the propriety of the religious celebration of marriage, as one grand distinction between the virtue of matrimony and the vice of concubinage. There are but few men who have entertained, or been able to apprehend, a doubt upon the subject: and even the few who have been most zealous in contending for the merely civil contract, have been restrained by a sense of propriety from the practical application of their own principles, under circumstances, which involve no right of inheritance, and under which the civil advantages of marriage might be secured by civil bonds: and they have deferred so far to the public opinion, as to seek no other redress of their alleged grievances, than a modification of the existing formulary, or a licence to ratify the marriage,

under a minister, and with forms agreeable to their private notions of religious doctrine and discipline. It has been strongly urged, that the religious celebration of marriage is as congenial to the common sense of Englishmen as the trial by jury; that no father would consent to the marriage of his daughter, that no woman who respects herself would submit to be married, without a religious ceremony; and that, if under any change of the law the necessity of marrying in the Church should cease, the religious service would not be abolished but transferred[b].

It is asserted by Blackstone, that "it is held to be essential to a marriage, that it be performed by a person in orders, though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini:* it being said, that Pope Innocent III. was the first who ordained the celebration of marriage in the Church, before which it was totally a civil contract[c]." It is obvious to remark, that the learned commentator states the fact on the authority, not of his own investigation, but of general report, which, it has been remarked [d], that he has so far invalidated, as to acknowledge in another place the earlier practice of the *dos ad ostium ecclesiæ*, which was the ecclesiastical recognition of the espousals. It is but a disputable fact, therefore, which is the origin of the opinion, that the intervention of a priest in the celebration of marriage is *juris positivi:* the universal use of at least some form of religious ratification seems to justify the

[b] Chr. Remembrancer, vol. iv. p. 294. [c] 1 Bl. Com. c. 15.
[d] Shepherd's Elucidation of the Common Prayer; Office of Solemnization of Matrimony.

opinion that it is *juris naturalis:* and it was the doctrine of the Church, affirmed by Isidore of Seville[e], long before the existence of any thing which bears the name of common law of England, that it was *juris divini.* The doctrine that it is essential to marriage that it be performed by a person in orders, is founded, not on the statute, but the common law, the unwritten, unrepealed law of the remotest antiquity, and applies equally to the present form of solemnization, which is undisputed; to the celebration in the face of the Church or the congregation, under the law of Henry VIII. and the ritual of Edward VI. and to the ancient *dos ad ostium ecclesiæ.* The publication of banns, which might be as reasonably attributed to the council of Trent as the solemnization of marriage to the council of Lateran, has made marriage always an ecclesiastical act. Lord Hardwicke's bill[f] makes no mention of orders, because the practice was too common to require a declaration of the law. The last Act does only not set aside the marriage which is contracted in good faith of the orders of the minister.

It is nevertheless necessary to distinguish the civil

[e] De Div. Off. l. ii. c. 19. Quod in ipsa conjunctione connubii a sacerdote benedicuntur, hoc est a Deo in ipsa prima conjunctione hominis factum . . . Hac ergo similitudine fit nunc in Ecclesia qua tunc factum est in Paradiso.

[f] Blackstone (Com. b. i. c. 15.) calls this Act, "an innovation upon our ancient laws and constitution," with manifest allusion to the nullifying power given to guardians and the court of chancery. In Dalrymple v. Dalrymple the description is most inaccurately applied to the subject of irregular marriages, and the necessity of resorting to a public and regular form, which was no innovation.

effects of marriage from its divine origin and religious ratification, and to admit, that under the provisions of national law, the one may be obtained without the intervention of the other. In Scotland and in France marriage is a merely civil contract, conveying civil rights, and regulating the legitimacy of children and the descent of property, without a religious celebration. In England also, under the Marriage Act, the religious ratification was nullified by the neglect or contravention of the forms prescribed by the law: and there is also an intermission of the customary office in the case of the Quakers and the Jews, with a legal reservation of their civil rights: but these are exceptions to the general tenour of English law and of English feeling, traditionally delivered from the remotest periods of English history. It is acknowledged, that by the laws of France, so early as the beginning of the ninth century, (A. D. 820.) the use of the sacerdotal benediction, and the contract of marriage in the Church in the presence of the priest, was not only common, but that no other marriage was deemed legitimate, and that under this customary form of nuptial benediction, the second of our English sovereigns, Ethelwolf, was married to the daughter of Charles the Bald. The practice of our Anglo-Saxon ancestors is further explained by the laws of king Edmund, in the following century, (A. D. 940.) requiring the presence of a priest at the espousals, who, by delivering the blessing of God, might promote the union of the parties in all sanctity, and in all fulness of happiness: and the council of Winchester, in the next century, (A. D. 1076.) declares it to be no less than the prostitution

of a daughter, to give her in marriage without the benediction of the priest. Other councils of the same age require the celebration in the face of the Church, and prohibit the celebration in private and unhallowed places[g]. In a great council held in Ireland, (A. D. 1171.) it was ordered, that the laity, who wished to have wives, should unite them to themselves by the ecclesiastical law: for many of them had as many wives as they liked, and were accustomed to take wives of their relations, and even their sisters, if *germanas* is here to be so understood[h]. The rule of this council recognizes the ecclesiastical law as a known and settled rule: and the neglect of that law resulted in the prevalence of polygamy, and probably of incest. The marriages which were contracted without the sanction of that law may be supposed to have been of the same nature, as the union of slaves in feudal times, which was not solemnized by any religious ceremony or sacerdotal benediction, and was not called *nuptiæ* or *matrimonium*, but *contubernium*[i].

These synodal authorities were all previous to the council of Lateran, and may be alleged in proof of the antiquity and necessity of the religious ratification of marriage. The same necessity was enforced in the Act, 32 Hen. VIII. c. 38. requiring the celebration of marriage in the face of the Church; and the revised Office of Matrimony, concerted in

[g] Ux. Ebr. l. ii. c. 29. Comber, Intr. Office of Matr.

[h] Gent. Mag. vol. 94. pt. ii. p. 427. from the Decem Scriptores, col. 1071.

[i] Robertson's Charles V. vol. 1. note ix.

the reign of his son, and reestablished in the reign of Elizabeth, speaks of the ministration of the priest and the curate, and of the assembly of the parties in the presence of God and of the congregation. The constant effect of the religious ratification is thus expressed in the quaint language of a lawyer[k], in the reign of James I. in shewing "how baron and fême are said to be one person. If Titus and Sempronia, by words *de præsenti*, in a lawful consent contract marriage, they are man and wife before God. But they cannot do all that married persons may: ye know my meaning: *id possumus, quod de jure possumus:* but they may, saith Parkins, infeoffe one another: for they are not yet *una persona* in the eye of the law. If it fall out, that the woman chance to die before nuptials celebrated, he which is no more but betrothed, shall not have her goods, except it be by her last will and testament, which she might, without craving licence of any body, have ordained according to her pleasure. . . . Public celebration, therefore, according to law, is that which maketh man and wife. In plain view of law, *consensus non concubitus facit matrimonium.* But one naile keepeth out another, and a firm betrothing forbiddeth any new contract; yet they which dare play man and wife only in the view of heaven and closet of conscience, let them be advised how they shall take the advantages or the emoluments of marriage, in conscience or in heaven: for on earth, if the priest

[k] The Woman's Lawyer, written about 1632, as is supposed by Justice Lawrence, and recited by Mr. Shadwell, in Beer v. Ward, as reported in Times, Nov. 22, 1823.

see no celebrated marriage, the judge saith no legitimate issue, nor the law any reasonable or constituted dower."

The doctrine of this ancient lawyer agrees with the cumulative argument of Mr. Serjeant Bosanquet[1],

[1] In Beer v. Ward, in Chancery, reported in Times, Nov. 18, 1823. In this case application was made to set aside a second verdict in the court of King's Bench, on the ground that the Chief Justice, in his charge to the jury, had mistaken the law when he said that a marriage, without religious solemnization or the presence of a priest, and merely with consent of parties, admitted before sufficient witnesses, and followed by cohabitation, was, before the passing of Lord Hardwicke's Act, a valid marriage, for all purposes whatsoever, according to the then known law of the land, as was the case with the law of Scotland to this day. In support of this application no less than six counsel were heard; viz. Mr. Scarlett, Gaselee, Wetherell, Bosanquet, Denman, and Phillips. (Times, Apr. 30, 1824.) The Lord Chancellor commented upon that part of the Chief Justice's charge, which related to the law of marriage in this country, before the passing of Lord Hardwicke's Act. It was not accurate to state that our law was the same as the law of Scotland: it had never been so loose. It was difficult to deny that a marriage might be celebrated without the presence of a clergyman, with some qualification; that was when the person performing the ceremony was supposed to be a clergyman. The case was different where a fraud was intended by one of the parties. The Chief Justice's charge went on to say, that a contract between the parties, followed by cohabitation, and accompanied by a declaration in the presence of witnesses, constituted a good and legal marriage at that period of our history, as it would in Scotland at this day. There was no doubt that it would constitute a good marriage in Scotland, a valid but irregular marriage. It was contended in the present case, that the attention of the jury ought to have been called to the question, Are you sure, according to the evidence, that such a contract had been so made between the parties? And it was

affirming that there is a long stream of authorities in support of the principle, that to constitute a valid marriage, so as to make the issue capable of inheriting, there must be a priest, a church, and a religious ceremony. In all cases in which the question has arisen, whether in real or personal actions, in writs of right or dower, the distinction has always been recognized between *ipsum matrimonium* and a legal marriage. The passages in the records and books may be found under the proper heads in the abridgments of Bell, Shepherd, Baker, and Viner, the most ancient of the cases being noted in those books from the open rolls of Edw. I. Edw. III. Hen. III. from Bracton, and the decretals of Gratian, and from most of the eminent reporters. Among the cases in the time of Henry III. is that of a man who had contracted marriage with a woman, and afterwards married another woman *in facie ecclesiæ:* the second marriage was dissolved, and he was di-

said, that the principles laid down by the Chief Justice were bad in law. Cases were cited to shew, that although a contract of marriage *per verba de præsenti* before the year 1756, was a good contract, to use the Solicitor General's phrase, *quoad hoc*, yet it was not a legal and valid marriage of itself, that is, that the issue of such marriage, if the parties were not afterwards compelled to celebrate it *in facie ecclesiæ*, were illegitimate. Times, May 6. His final opinion was, that the best thing he could do in this case was to direct a trial at bar, and thereby have the opinion of all the judges of the court upon the law. Times, May 8. The parties afterwards retired from the suit, which had been carried on for more than fifty years. The chief question at issue was, whether the issue of a pretended private marriage could inherit in preference to the issue of a subsequent public marriage.

rected by the ecclesiastical court to celebrate the first marriage *in facie ecclesiæ;* before doing which he aliened his land. At his death his wife brought her suit of dower, and it was held that he was capable to alien, because at the time they were not man and wife in the legal sense, although they were contracted. There are passages in Bracton which may seem to favour the opposite opinion ; but if the station and character of the writer be considered according to the suggestions in the preface to his book, it will be seen that he was strongly inclined to support the pretensions of the civil and pontifical over the common law jurisdictions, when the contest between them was at the highest. The statute of Merton, which signalized the defeat of the churchmen in their endeavour to assimilate the law of England respecting bastards to the Roman ecclesiastical law, afforded much more manifest proof of the real state of the law between marriage and legitimacy. In the address to Cromwell, after the ordinance legalizing marriages made before justices of the peace, it was distinctly said, that before the period of the Usurpation a marriage to be valid as to the legitimacy of the issue must be solemnized by a priest in orders, and although a church or chapel and the whole marriage ceremony were not necessary, yet they were meet and comely to be observed also. And to shew further how undeviating the impression had been, in the first year of the Restoration an Act was passed to render these marriages before justices of the peace valid, which care must have been useless if contract and cohabitation could have created a marriage valid for all purposes what-

soever. Looser contracts might indeed be good for many purposes, but in any action where the legitimacy of the heir, or the validity of the marriage, was in dispute, the jurisdiction was reserved to the bishop. In regard to the civil marriages under the Usurpation the Act of the Restoration particularly withdrew all the question of legitimacy which might arise under it from the bishop's jurisdiction, because it was well understood with what sort of feelings the clergy and ecclesiastical lawyers were likely to look upon them. There are also particular expressions in the Marriage Acts of William III. and Anne, which intimate that the statute and common law always contemplate the necessity of a priest in orders solemnizing a legitimate marriage. In times more recent is the case of General Fielding, who was married to a woman representing herself to be a Mrs. Duloe, by a priest in one of the embassies. When the general discovered the mistake he considered himself released from the marriage, and was afterwards married to the celebrated Duchess of Cleveland, whose sons indicted him for bigamy, of which he was convicted. On the trial the whole strength of the charge fell upon the consideration of the priest's orders, without a firm belief in which it was clearly understood that the jury must have acquitted him.

These authorities are of the highest value in obviating a bold opinion which has been recently advanced, that "before the Marriage Act the marriage of dissenters in the face of their own congregations was good in law. Of this fact there is no doubt. Whatever grievances they have to complain

of originated at that period. Their claim, or, if that is a more palatable word, their petition, is to be restored to the situation they were in, as far as marriage is concerned, before the passing of that statute[m]." This is the language of an advocate more zealous than candid or judicious; and the fact upon which he principally relies is certainly too undoubted to call for any remark: and there is another fact also too important to be overlooked, that in the recent revisions of the Marriage Act the Unitarians made but a very faint attempt to be placed in the same condition as the Quakers and the Jews, or to be merely exempted from the provisions of the Act. In the measures also which they themselves have proposed for their relief they have sought either a curtailment of the liturgy or a licence to celebrate marriage in their own forms, with the privilege of having those marriages recorded in the registers of the Church. In these practical attempts to obtain something more than mere exemption they have tacitly contradicted their advocate, and admitted the insufficiency of the mere exemption, which he represents them to solicit. In the very petition upon which this ignorant or disingenuous remark was founded the Unitarians themselves have affirmed, that "the marriages of dissenters celebrated in the face of their own congregations were considered valid in our courts of law, although some attempts made to disturb such marriages in the ecclesiastical courts served to dispose the majority of the dissenters, between whom and

[m] Edinburgh Review, lxix. art. iii.

the established Church there was then no essential difference in points of doctrine, to conform in that particular to the ritual of the Church[n]."

The avowed principle upon which the dissenters profess to conform, and upon which they justify themselves under the charge of inconsistency in conforming, with the prescribed ritual of the Church is, that "they consider marriage as a civil affair, and therefore can submit to the will of the magistrate in regard to the place[o] as well as other circumstances of this rite." It might not be unreasonable to enquire, how many marriages of dissenters are contracted in entire ignorance of this principle, and on considerations perfectly distinct; but it is sufficient for the present occasion to know, that this principle is very different from the motive alleged by Unitarians for the acquiescence of dissenters, and that if it does not expressly admit the legal necessity, it offers

[n] Ibid. See Appendix, No. II.

[o] Nonconformists' Catechism, pt. ii. qu. 84. "The marriage ceremony is performed at the altar; an evident relic of popery, which makes matrimony one of the seven sacraments. If it be objected that dissenters are inconsistent in submitting to be married at the altar, it is answered, they consider marriage," &c. The rubric requires but a very small part of the service to be performed at the Lord's table, and practical convenience only has led to the alteration. The word altar, which was retained only in the first Book of Edward VI. was succeeded in the second Book by the word the Lord's table, (see Appendix, No. III.) and the offensive word does not now occur in any of the rubrics, prayers, or exhortations of the Church of England. It is notorious that many of the Romish sacraments were not performed at the altar. Such insinuations would justify the most rigid severity in examining the validity of the excuse.

no objection to the use of the religious ratification of marriage.

The principal position of the Unitarians, that after the Toleration Act and before the Marriage Act the marriages of dissenters in the face of their own congregations were considered valid in the courts of law, seems to limit the investigation which is required, and may be sufficiently refuted, if it can be shewn that the supposed validity was unknown before the Toleration Act; that it was not established by the Toleration Act; that it was not recognized in the interval between that Act and the Marriage Act; and that the Marriage Act did not interfere with any existing privileges of the dissenters.

Under the ordinance of the Usurpation the liturgy was proscribed, the religious celebration of marriage was made a penal offence, and a legal character was given to marriages contracted before a justice of the peace, who was to declare the parties husband and wife, and it was ordained that such marriage should be good and effectual in law. The last provision was unnecessary if the legal validity of the civil contract had been the previous doctrine of the law. The Act of the Restoration (12 Charles II. c. 33.) gives additional force and perspicuity to this argument, by enacting that any marriage had and solemnized, since the first day of May 1642, under colour of certain ordinances in some other manner than hath been formerly used and accustomed, shall be of the same and of no other force and effect, as if such marriages had been solemnized according to the rites and ceremonies in the Church and kingdom of England, any law, custom, or usage, to the con-

trary notwithstanding. The Act records at once the ancient practice and the recent innovation in respect of marriages had in some other manner than hath been formerly accustomed: it implies, that by law, custom, and usage, these marriages were liable to be disputed; and it gives to them the validity which was wanting by the neglect of the ancient law. It is puerile to argue that these marriages "were declared legal *without any fresh solemnization*[p]," for in many cases the solemnization must have been rendered impracticable by the decease of the parties; in many more it must have been retrospective in reference to the issue; and in all it must have contracted the *grace* of the Act, which alone dispensed with the necessity of the solemnization. To the positive argument may be added the negative proof, which is implied in the omission of all notice of marriages celebrated according to the suspended ritual of the Church, and which did not want any new confirmation, because they were originally valid in themselves. The Act proceeds to provide, that the issue upon the lawfulness of these marriages contracted during the Usurpation shall be tried by jury at the common law, any law, usage, or statute, to the contrary notwithstanding, thus particularly exempting them from the jurisdiction of the ecclesiastical courts, to which they ordinarily and properly belonged, and in which as religious acts they would have been tried without this exceptive provision. It is conceived, that this is an irrefragable proof of the invalidity of the merely civil contract in the

[p] Freethinking Christians' Quarterly Register, No. iii. p. 273.

beginning of the reign of Charles II. in which was also passed the Act of Uniformity confirming all the liturgical provisions which had previously existed in respect of marriage, and particularly the trine publication of banns in the church, which alone gives a certain connexion between religion and marriage, and which had been suspended during the Usurpation, when by a very consistent practice banns were published in the market place on the market day, and the marriage was contracted before a justice of the peace.

It is not pretended that any other Act of Charles II. or any Act of James II. counteracted these legal provisions for the religious celebration of marriage and the prevention of the merely civil contract: but an argument, which it may be proper to notice, has been drawn from a passage in the life of Judge Hale, recorded by Bishop Burnet, in which that good man is said to have shewn his moderation towards dissenters "in the care he took of preserving the quakers from that mischief that was like to fall on them by declaring their marriages void, and so bastarding their children: but he considered *marriage and succession a right of nature*, from which none ought to be barred, what mistake soever they might be under in the points of revealed religion. And therefore in a trial that was before him, when a quaker was sued for some debts owing by his wife before he married her, and the quaker's counsel pretended that it was no marriage that had passed between them, since it was not solemnized according to the rules of the Church of England, he declared he was not willing on his own opinion to make their

children bastards, and gave directions to the jury to find it special. It was a reflexion on the whole party, that one of them, to avoid an inconvenience he had fallen in, thought to have preserved himself by a defence that, if it had been allowed in law, must have made their whole issue bastards and incapable of succession . . . because he would have thought it a hardship, not without cruelty, if among papists all marriages were nulled which had not been made with all the ceremonies of the Roman ritual, so he, applying this to the case of the sectaries, thought all marriages made according to the several persuasions of men ought to have their effects in law."

It will not be denied that the plea of the defendant was most flagitious, and worthy of the most adverse interpretation which the law would allow; but how cautious and deliberate under such circumstances was the conduct of the judge? he could act upon his own principles only by avowing them: but, notwithstanding the natural bias of his mind in favour of moderation towards the dissenters, confirmed by his experience of the validity of the civil contract under the Usurpation, and by the flagitiousness of the case before him, he only directed the jury to find it special; he did not take upon himself, he had not the perfect conviction in his own mind, he had not the authority of precedents to justify him in giving a construction to the law according to his private opinion and desire, and he therefore reserved the point for further argument and a more competent jurisdiction than his individual judgment, and was willing to give the plaintiff the

benefit of any doubt which might arise in the interpretation of the law. The act of the quaker, the plea of his counsel, and the direction of the judge, all agree in proving that the law was at least not decided in favour of the civil contract; and it is obvious to remark, that Burnet has reported only the case of the defendant, and given to that report his own partial colouring.. This was also a case of marriage *de facto*, which the temporal courts allow to be sufficient to give title to a personal estate, because the lawfulness of marriage is not the point to be tried, as in a writ of dower[q], and therefore any decision of the suit would not have produced those effects of bastarding the issue, which were more probably apprehended by Burnet than by Hale. It is an equivocal inference which is drawn from this statement, that "quaker marriages are now good in law, although since the days of Judge Hale no statute has been passed which declares them to be so[r]." If in the days of Judge Hale they were valid, no statutory declaration of their validity was required, and any doubt of the necessity of the declaration is an impeachment of their validity: but if no statute has declared them valid, there is a statute (6 William and Mary, c. 6.) which has declared them doubtful, laying a duty upon Jews and Quakers, cohabiting as man and wife, although not married according to the law of England, and adding a proviso that nothing therein contained shall be construed to make good or effectual in law

[q] Burn's Ecclesiastical Law; Art. Marriage. [r] Freethinking Christians' Quarterly Register, No. iii. p. 275.

any such marriage, or pretended marriage, but that they should be of the same force, and no other, as if the said Act had not been made[s].

If then the validity of the civil contract, independent of the religious ratification, was unauthorized or doubtful before the Toleration Act, can that Act be shewn to convey to the dissenter any new privilege in respect of marriage, of which he was not before possessed? The Act itself exhibits no signs of such conveyance, not in its title of "An Act for exempting their Majesties' Protestant subjects dissenting from the Church of England from the penalties of certain laws;" not in reference to the Acts which it restricts or counteracts; not in the discharge from penalties incurred; not in the allowance of deputies; not in the extent of the exemption; not in the registry or administration of the oaths; not in the relief of the Quakers; nor in any other of its clauses. The sole design of the Act is to exempt dissenters from penalties, which would otherwise have been incurred, not to convey privileges which were not otherwise possessed.

In the interval between the Toleration Act and the Marriage Act there are many authorities very unfavourable to the validity of marriages contracted without a religious ratification. The Act of 6 William and Mary, c. 6, has been already recited, in which Jews and Quakers not married according to the law of England are described as cohabiting together as man and wife, and which is not to be construed to make good in law such marriage, or

[s] Burn's Ecclesiastical Law.

pretended marriage. But "the Act 7 and 8 William III. c. 35, seems to put this matter out of all doubt, by laying a penalty on clergymen if they celebrate marriage in a clandestine manner; for if the same privileges and advantages attended marriages solemnized by the dissenters as those celebrated according to the Church of England, how easily would that Act be evaded and rendered of no effect? There would then be no occasion for licence or banns; for making oath, or giving security, that there were no legal impediments; but every one might do what was right in his own eyes, who should get himself admitted of a dissenting congregation[t]." Neither this Act nor the other Acts, 6 and 7 William III. and 10 Anne c. 19, contemplate the celebration of marriage by any but "a person in holy orders, beneficed or not beneficed:" complaint is only made of the offences of "parsons, vicars, and curates, who substitute and employ, and knowingly and wittingly suffer and permit, divers other ministers to marry great numbers of persons in their respective churches and chapels without publication of banns, or licence of marriage first had and obtained; many of which ministers have no settled habitations, and cannot easily be discovered and convicted:" complaint is also made, that "divers ministers, being in prison for debt, or otherwise, do marry in the said prisons many persons resorting thither for the purpose aforesaid, and in other places, for lucre or gain to themselves, by all which means the duties and impositions upon licences of marriage

[t] Burn's Ecclesiastical Law.

are greatly diminished, and many other great inconveniences do arise." It is a melancholy picture which these Acts present, both of the state of the clergy and of the irregular solemnization of marriage, through their connivance and neglect: but although they record the celebration of marriages in prisons and other places, they indirectly assert the necessity of orders in the minister of marriage, without which the people would not have resorted to their ministration in such places. For the correction of these abuses, and, at the same time, for the preservation of the revenue, a penalty of £100 was imposed upon any "parson, vicar, or curate, who should marry any persons in any church or chapel, exempt or not exempt, or in any other place whatever, without publication of banns or licence," a clause which could have been of no avail, but on the supposition that marriage could only be celebrated by "a parson, vicar, or curate." A penalty of £10 was also levied upon every man who should be married without licence or publication of banns; whence arose a curious question, which will be mentioned hereafter: and a yet further penalty of £5, which more distinctly shews that marriage was considered an ecclesiastical act, was levied upon every sexton or parish clerk, or other person acting as sexton or parish clerk, who should knowingly and wittingly aid, promote, and assist at such marriages so celebrated without banns or licence. The Act of Anne restricts the character of the persons on whom the penalty was imposed, by an express reservation to all archbishops and others of "full power of inflicting all such pains and censures for

this or any other crime or crimes, as they might have done if this Act had not passed." In these Acts no mention is made of the offences of persons not in orders: the publication of banns, or the possession of licence, both acts of ecclesiastical administration, are required under a penalty: Scotland, where a different law prevailed, is exempted under the statute of Anne: and if the penalty only is levied, and nothing is said of the validity or invalidity of the marriage itself, may not the omission be construed to declare the state of the law, under which such marriages were in their very nature liable to dispute, and were in fact disputed? The nullity afterwards expressed in the Marriage Act was the consequence of a new offence created by the law, and requiring a distinct enactment. Under William and Anne the law required the intervention of a person in orders, and the provision of the common law was affirmed, inasmuch as it was not restricted or superseded by any positive statute.

It is nevertheless certain, that marriages were contracted without the intervention of a person in orders; and it is admitted, with a certain ambiguity of language, that "attempts were made to disturb such marriages in the ecclesiastical courts." It should be remembered, that the ecclesiastical courts are the courts to which the common law hath assigned the trial of the validity of marriage, and that the attempts to disturb these irregular marriages were made by the parties immediately interested, and not by the interposition of any ecclesiastical authority. There are three cases recited by Burn; 1. Wigmore's case, 5 Anne; where the wife sued

in the spiritual court for alimony, being married to an anabaptist, according to the forms of their religion, although with licence from the bishop to marry. In prohibition, Holt, Chief Justice, held that the canon law admitted the validity of the contract *per verba de præsenti:* the marriage was therefore admitted so far, that the parties could not be punished for fornication, but for not solemnizing the marriage according to the forms prescribed by law, but not so as to declare the marriage void. This appears to be a most favourable case; but it is nevertheless liable to the objection, that the contract was subject to a compulsory celebration *in facie ecclesiæ*, without which it was not valid to all purposes; that, as the licence was obtained, the penalty incurred for not solemnizing the marriage was different from that imposed by 7 and 8 William III. and that the action was on the fact, not on the law, instituted for alimony, and involving only the question of wife or no wife. If the action had been on the higher ground of dower, a different decision might have been expected. 2. In the case of Haydon and Gould, before the delegates; Haydon and his wife were Sabbatarians, and had been married, in a Sabbatarian congregation, by one of their ministers, using the ritual of the Church, with the omission only of the ceremony of the ring. On the woman's death, Haydon, as her husband, took out letters of administration; to which her sister objected that they were never married; and as it appeared that the minister who married them was a mere layman, and not in orders, the letters of administration, granted to Haydon as the husband, were revoked, and a new

administration granted to the sister. This sentence clearly proved the invalidity of marriages not celebrated by the intervention of a person in orders, on which the question principally turned: and the sentence, upon appeal, was confirmed by the delegates, upon the argument, that as Haydon demanded a right to himself as husband by the ecclesiastical law, he ought to prove himself a husband by that law. A case was also cited out of Swinburn, where such a marriage had been ruled to be void, as to the privileges attending legal marriages. 3. The case of Middleton v. Croft, which was for marrying without the canonical hours, is very important, on account of the judgment of the court delivered by Lord Hardwicke after several arguments at the bar. The plaintiff pleaded the statute of 7 and 8 William III. c. 35, imposing a penalty of ten pounds on every *man* marrying without banns or licence; notwithstanding which, he and his wife had been cited in the spiritual court for an offence against the canon, by which, as lay-persons, they were not bound. The court agreed that lay-persons were not within the words of the canons of 1603; that the spiritual court had a well-founded jurisdiction under the former canon law, to proceed against the plaintiffs for a clandestine marriage: and on the question, whether the statute of 7 and 8 William III. had, by inflicting that penalty, taken away the jurisdiction of the spiritual court, it was to be observed, that as to the woman, she indisputably remains subject to the ecclesiastical jurisdiction, for the penalty is only upon the man: but as to the man likewise, the court was unanimously of opinion, that

the ecclesiastical jurisdiction is not taken away by the statute, but that both the jurisdictions do stand well together.

The admission that the "attempts made to disturb such marriages in the ecclesiastical courts served to dispose the majority of dissenters . . . to conform in that particular to the ritual of the Church," tacitly proves the efficacy of those attempts, and the prevailing opinion of the state of the law at the time. If these attempts had been defeated, they would have failed of producing the result which is imputed to them; if the decisions had been unjust, or opposed to the known spirit of the law, they would have been disputed and overruled; the body of the dissenters, always active in resisting oppression, and in maintaining their civil rights and privileges, would not, in justice to themselves or to public right, have acquiesced in a series of unjust decisions; and it would have been a stigma on the pure and equal administration of English law, if such injuries had passed without redress. If there had been but a single case, in which the force of the civil contract had been weakened by the want or the irregularity of the religious ratification, it had been sufficient to prove the necessity of that ratification to the validity of the marriage.

It is not therefore true that "before the Marriage Act, the marriage of dissenters in the face of their own congregations was good in law," or that they possessed "the right of marrying at their own meetings, and agreeably to their own forms:" nor was the Act, whatever were its other faults, designed to destroy the validity of these marriages, or in any

wise to "abridge the religious rights and privileges" of the dissenters. The declared purpose of the Act is "the better preventing of clandestine marriages:" and without insisting on the proper and technical use of the word clandestinity, to denote marriages celebrated out of the Church; without giving any undue force to the prohibition to solemnize matrimony in any other place than a church or public chapel, where banns have been usually published; without dwelling upon the negative evidence of the Act, in not making the faintest allusion to marriages celebrated without the intervention of a person in orders; it is proper to observe, that the measures by which the Act accomplishes its purposes, are, by enforcing the provisions for the due publication of banns, and the legal attainment of a licence. The immediate occasion of the Bill was the abuse of the law of precontracts; and the ultimate object was, to prevent the recurrence of those irregular marriages which were prevalent at the time, under the name of "Fleet marriages," from their celebration in the Fleet prison: and there was "no ceremony or solemnity required by the Bill, but what was absolutely necessary for ascertaining the marriage, and rendering it public[u]." It is in vain to interpret this of the compulsory use of the office of matrimony, which had ever been in use, and which alone had been found ineffective: it evidently relates to the new provisions, which had been introduced in respect of the banns and licence, in reference to

[u] Speech of Ryder; Att. Gen. Hansard's Parl. Hist. xv. p. 11. recited in Freethinking Christians' Quarterly Register.

which the Bill was free from the charge of "inflicting any penalties upon the innocent, or any more severe penalties upon the guilty than they deserve[x];" and upon the neglect or misuse of which all the suits of nullity of marriage instituted under the Act have eventually been found to turn. This was the object and method of the Bill, which was not designed either to remove or "to establish a ceremony contrary to the conscientious scruples of any who might be called upon to submit to it[y]," and whose scruples could only have been violated by anticipation, since the dissenters of the day confessedly "conformed, by choice, to the form of marriage as practised in the Church," with the only exception of Jews and Quakers, and they were exempted.

The Act contains but two clauses which can be construed to interfere with the religious principles of the dissenters. By sect. 8. it is enacted, that "whereas many persons do solemnize matrimony in prisons and other places, without publication of banns or licence of marriage first had and obtained; therefore, for the prevention thereof, be it enacted, that if any person . . . shall solemnize matrimony in any other place than a church or public chapel, where banns have been usually published, unless by special licence . . . every person knowingly and wittingly so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony . . . and all marriages celebrated in any other place than a church or such public chapel, unless by

[x] Speech of Ryder: Att. Gen. Hansard's Parl. Hist. xv. p. 11. recited in Freethinking Christians' Quarterly Register.

[y] Freethinking Christians' Quarterly Register, No. iii. p. 281.

special licence, shall be null and void." By sect. 13. it is further enacted, that "in no case whatsoever shall any suit or proceeding be had in any ecclesiastical court, to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de præsenti* or *per verba de futuro* . . . any law or usage to the contrary notwithstanding."

If either of these clauses had been intended to take away the alleged right of the dissenters, to contract valid marriage in the face of their own congregations, it might have been expected that the alleged right would have been as distinctly recognized as the compulsory enforcements of contracts of marriage, and that it would not have been rescinded without some grave apology or excuse, without the imputation of some offence calling for the restriction, without something more definite than the allusion to many persons solemnizing marriage in prisons and other places; an allusion which, on comparison with the history of the time as well as with the Act of 7 and 8 William III. evidently applies to the clergy, whose offence it was designed to correct. The thirteenth section tacitly recognizes the imperfection and invalidity of the contract *per verba de præsenti*, or *per verba de futuro*, which the Chief Justice Holt pronounced to be the authority for the marriage of dissenters, and the abuse of which was the occasion of the Bill, by superseding the compulsory celebration of such contracts *in facie ecclesiæ* which was necessary to their consummation.

It is known that no Bill ever excited more angry debate than the Marriage Act: but is it credible,

that among the many objections brought against the measure, no mention should have been made of the infringement of the rights of dissenters, if there had been either an avowed or a secret design of infringing those rights? It is described by Lord Orford[z] as a measure "breathing the very spirit of aristocracy and insolent nobility;" as an invention for extending the power of the Chancellor: but if it interfered with the liberty of the dissenters, was it not equally liable to the charge of extending the power of the Church, and would not the charge have been recorded by the memorialist, who delighted in the collection of insinuations and exceptions, and who has certainly shewn no favour to the bishops in the account of its progress through Parliament? Is it credible, that the dissenters at the time should have offered no objection to the measure, have made no effort to maintain their supposed rights, or that, in the consciousness of recent decisions in the courts against them, they should have sought no review of these decisions, no means of preventing their recurrence, no removal of any doubts or ambiguities, in which their case was involved? Or is it credible, that their successors, for nearly sixty years[a], should have consented to bear

[z] Memoirs of the last Ten Years of the Reign of George II. vol. i. p. 293—304.

[a] "We have seen it asserted, that when the district meetings of the United Dissenters took place in England, in the year 1789, in order to obtain the repeal of the Test and Corporation Acts, it was also designed to move for an emendation of the Marriage Act; the object however of these meetings was speedily abandoned, and the design of moving for any alteration

the burthen which the apathy of their forefathers had laid upon them; to make little or no effort for the recovery of a lost privilege, and in the end have suffered the Unitarians alone, by themselves, and for themselves, without any sympathy or cooperation from the dissenting body, to seek relief from the imputed oppressions of the statute?

There is the report of a speech of Lord Barrington in defending the Bill against the charge of innovation: "If gentlemen will but attend to the laws we have now in being, they must see, that all these things have been by them already in a great measure taken care of. No marriage can be good unless it has been solemnized according to that religious ceremony prescribed by that sect of religion to which the contracting parties belong[b]." The Parliamentary Reports of this period are at least of doubtful authenticity, and there is no very clear consistency in these consecutive assertions. The laws then in being did not provide for the validity of marriages celebrated according to the rites of different sects, which is claimed only under the common law, that law which provided for no dissent from the Catholic religion. It is remarkable also, that Lord Orford, in the captious account which he has left of the Bill,

in the Marriage Act, if ever entertained, was never proceeded in." Freethinking Christians' Quarterly Register, No. iii. p. 287. In the same journal complaint is made of the supineness of the Unitarians, before they were stimulated by the Freethinking Christians: and there appears now to be but little concert between the two parties in their opinions or projects of relief.

[b] Hansard's Parl. Hist. vol. xv. p. 25. Ibid.

takes no notice of the speech of Lord Barrington, and, so far from insinuating that there was a tendency in the Bill to abridge the freedom of dissenters, he dwells with manifest pleasure on the clauses which it contains for the restriction of ecclesiastical power[c].

It is true, that the Protestant dissenters of Ireland are allowed to marry by their own forms: but as they derive that privilege under a special statute, their privilege rather invalidates than confirms the supposed right of the English dissenters to the same privilege.

It is contended, that "the Marriage Act was never intended as an abridgment of religious freedom; the only two sects who asked for the exemption had it:" and that "a burthen on conscience . . . was not intended by the legislature, as may be

[c] "The new Bill enjoined indispensable publication of banns, yet took away their validity, if parents, nay, if even guardians, signified their dissent, when the parties were under age: a very novel power!" (it was not granted in this case:) "but guardians are a limb of chancery! The archbishop's licence was indeed reserved to him. A more arbitrary spirit was still behind: persons solemnizing marriage without these previous steps were sentenced to transportation, and the marriage was to be effectually null. So close did congenial law clip the wings of the prostrate priesthood. And as if such rigour did not sufficiently describe its fountain and its destination, it was expressly specified, that when a mother or a guardian should be non compos, resort might be had to the Chancellor himself for licence. Contracts and precontracts, other flowers of ecclesiastical prerogative, were to be totally invalid, and their obligations abolished; and the gentle institution was wound up with the penalty of death for all forgeries in breach of this statute of the modern Draco. Quakers, Jews, and the Royal Family had the only toleration." Memoirs, vol. i. p. 296.

fairly inferred from the exemption in the Act of the two classes of persons against whose religious feelings and discipline it seemed particularly to militate." Whether it was or was not intended, there was in fact an abridgment of religious freedom, if dissenters, who before were free to contract marriage in their own conventicles, were amerced of that privilege: and there was at the same time a burthen thrown upon conscience, if dissenters, who before had a choice of preference, were afterwards obliged to conform with a particular ritual. These are effects which no legislature could have produced without intention and design: if they were not intended, they were not produced; if they were produced, they were intended. The speculative agreement of the dissenters of the day in the doctrinal opinions of the Church did not alleviate the burthen of a compulsory conformity with the ritual.

It does not appear that the Jews and Quakers sought the exemption which was made in their favour. The exemption was not new. It was copied from the Act 6 and 7 Will. III. c. 6. And Burn notes a peculiar distinction in the two Acts, that in the former Act Quakers and Jews are said to cohabit as man and wife, although not married according to the law of England, and that the Act shall not be construed to make good and effectual such marriage, or pretended marriage; but that the latter Act contains no similar clause, but proceeds on the supposition that such marriages are good and valid. Whether this distinction can or cannot be sustained; whether the validity of these marriages rests on this particular statute; or whether a doubt

which has been thrown upon these marriages can be justified; the particular exemptions rest on particular grounds: and whether the Marriage Act be regarded as a matter merely of civil regulation and policy, or, as is by some maintained, an act of religious restraint, the wisdom and justice of the exceptions are approved by the peculiar character and circumstances of the parties excepted, of which the courts might require the exhibition of proof, under any suspicion of a fraudulent evasion of the law.

It would be the excess of absurdity to require the Jew to conform with the Christian ritual: the administration of no Christian offices can be supposed to have an influence upon his conscience, or to excite in him any feelings but those of exasperated prejudice. The ritual of the English Church must be especially offensive to a Jew, who denies the mystical union between Christ and the Christian Church, represented in marriage; who can be bound by no engagement contracted in the name of the Father, of the Son, and of the Holy Ghost; who can receive no instruction in the duties of marriage upon the authority of the apostles. It would have been vain to insist on such impracticable and nugatory conformity: and at the same time there was no civil danger in making the exception. The Jews are altogether a distinct and peculiar people: their manners cannot be counterfeited or assumed. The rabbi knows who is and who is not a Jew, and there was no reason to apprehend that he would celebrate marriage with any who were not of the Jewish persuasion. There was also an ancient ritual

peculiar to the Jews, and from their care in the preservation of pedigree there was no doubt of a sufficient record of every thing connected with their marriages.

The exemption of the Quakers was equally proper and expedient. The Quakers are also an isolated body; less zealous than any other sect of making or receiving proselytes; disposed to excommunicate any of their own body who may marry out of the communion of the Friends; and securing the identity of their several members by the practice of giving and demanding certificates on any removal of a member from one part of the kingdom to another. The exemption of Quakers was therefore an exemption of Quakers exclusively: it was an exemption not liable to abuse: there was no danger of its fraudulent extension. The Quakers also have a formulary of marriage, peculiar to themselves, celebrated in the face of their congregations, and duly attested. Experience of their pertinacious adherence to their own manners had shewn, that to require the Quakers to conform with the ritual of the Church would have been equivalent to an interdiction of their marriages, and a dissolution of their body.

In these two cases of exemption it was required that the man and the woman should both be Quakers or Jews. If one only was a Quaker or a Jew, the ritual of the Church was not to be dispensed with. There is another class of Christians whose religious feelings and discipline were particularly opposed by the Marriage Act, and if it had been the design of the legislature in that Act not to impose a burthen

upon conscience, the case of the Roman Catholics could not have been overlooked. They professed no agreement in the doctrines of the English Church. They, more than any other Christian body, had reason to complain, if the Marriage Act was an innovation upon any privileges previously possessed by nonconformists. They are taught to consider marriage as a sacrament, which none but a Romish priest is competent to administer. Although therefore in England the civil benefits of marriage cannot be obtained without a conformity with the ritual, it is to the Romanist nothing but a form; and it is distressing, that under any circumstances a religious administration should be nothing but a form. To the Romanist it is worse than a form: it is an heretical administration, exciting the worst of all feelings, a feeling of religious antipathy. Nor is it an unimportant consideration, that the Protestant Church admits the validity of all Catholic administrations, the reality of Catholic orders, and that before the Reformation, and under the æra of the common law, it was the Catholic priest alone whose administration could confer the requisite validity upon marriage. There can be no doubt therefore of the competence of the Catholic priest; and in Ireland the Catholic priest, as well as the dissenting minister, is legally authorized to celebrate marriage between the members of his own communion. In Ireland the Irish Catholic peasantry may be lawfully married by the Catholic priest; but in England the Irish labourers, not aware of the variations of the law in the two countries, apply to the priest, who has the imprudence to marry them, and their

marriage is not good in law. They nevertheless deem themselves married, but their marriage, however it may bind the conscience, has no legal validity without the interposition of the office of the established Church. This is a state of law than which nothing, since the recent revision of the Marriage Act, is more revolting to a religious mind. But the case admits of yet further aggravation. By a late law, the Irish poor, being destitute of relief, are liable to be removed to their own country, by a summary process, and the cruel operation of the law is thus consummated. The parents, being Irish, may be removed; the children, being illegitimate, the offspring of an illicit intercourse, or illegal marriage, cannot be removed, but have a legal settlement in the parish in which they were born, and are separated from their natural parents. Such practical injustice demands immediate redress, by restricting under a penalty the administration of the Catholic priest, without the certificate of a previous marriage according to the forms of the established Church, or by the simpler and more generous process of a legal recognition of the validity of marriages celebrated by a Catholic priest, where both parties are known to be Catholics. This concession would not prejudice the great principle of the religious ratification of marriage.

It has been now seen, that the perfect validity of marriage has always been dependent on the administration of a person in orders; that marriages contracted without the religious ratification were not valid before the Toleration Act; that the Toleration Act did not render them valid; that their validity

was not approved in the interval between the Toleration Act and the Marriage Act; that the Marriage Act did not therefore render them invalid; and that the only exceptions under that Act were of a peculiar cast and character. The grievance therefore recently alleged by the Unitarians and by the Freethinking Christians, and their petition for redress, must rest upon their own ground, viz. "that the marriage service required by the existing law is inconsistent in several points with the religious belief which the petitioners conscientiously entertain," and that "toleration is in their case necessarily incomplete while they are obliged by the marriage law to join in a service repugnant in many parts to their religious feelings and principles." This is the general statement of their case: the particular objections of the Unitarians, or rather of the Freethinking Christians, are more distinctly exhibited in various protests[d] against the use of the ritual. The substance of these objections is,

1. That it makes marriage a religious instead of a civil act, and that submission to a ceremony performed by a person in holy orders, or pretended holy orders, is painful and humiliating to the feelings of persons knowing nothing of a priesthood in Christianity.

2. That parts of the service are highly indelicate and offensive.

3. That it requires the man to worship the woman.

4. That it implies a recognition of the doctrine of the Trinity.

[d] See Appendix, No. II.

5. That the interference of any human institution with matters which concern their faith and conscience, cannot receive the sanction of Protestant dissenters.

It has been the aim of this and the preceding chapters, to refute the first and principal of these objections: and it is with no intention of depreciating the just weight and value of the other objections, that the immediate consideration of them is deferred and postponed to a brief review of the measures by which the relief of the alleged grievance has been sought; namely, petitions to the two Houses of Parliament; bills brought in by their advocates, in conformity with these petitions; and protests delivered by the Freethinking Christians to the clergymen officiating at their marriages.

To the exercise of the right of petition, in their case, no just objection can be made. It is the common privilege of Englishmen who think themselves aggrieved, to make their grievances known to the legislature, and to seek the redress which the case admits and requires. It is requisite for their own interest and the public good, that the petitioners shall state the fact, and nothing but the fact. Exaggerated statements of fictitious wrongs will hardly conciliate the favour of an enlightened senate.

In the Bill introduced by Mr. William Smith into the House of Commons, it was proposed, under specified circumstances, to curtail the Office of Matrimony; retaining only the exhortation, beginning, "I require and charge you both," &c. with the form of mutual stipulation immediately succeeding. The author of the Bill perceived the objections to the

measure, which he had the candour to withdraw, and which no attempt will be probably made to renew. The clergy would have scrupulously objected to a religious form, in which there was not a word of prayer or supplication: and the supporters of other measures of relief have had no hesitation in approving the resolution of the bishops, to withhold their consent from any such curtailment of the service. To such of the Freethinking Christians as embrace the full extent of the objections alleged against the present office for the solemnization of matrimony, it is not probable that any service, performed in a church, by a person in orders, or accompanied with any act of social prayer, will be acceptable.

Another measure has therefore been proposed, for allowing the Unitarians, under certain modifications, to celebrate their marriages in their private conventicles. It is very doubtful whether the principle of this measure has not been conceded with an unwise and inconsiderate facility, when the concession involves no less than an abandonment of the sacred character of marriage, and of the immemorial and truly catholic doctrine of the sacerdotal benediction, with the recognition of marriage merely as a civil contract, and of the validity of that contract without a religious ratification. The principle is equally new in English law and in English theology, and demands the gravest consideration. An age of luxury and refinement is not the time for weakening the impression which may be made by the religious solemnization, or rejecting the beneficial influence which may flow from the prayers and supplications

which are proper to the occasion ; and the history of imperial Rome has left a memorable record of the danger of relaxing the principle, the law, and the religion, of marriage. The effects of the meditated compliance are probably more extensive than they appear to be, and may be of such mischievous operation, as to require more than the provisions of another Marriage Act to correct them. If this concession be made, the Unitarians will be entirely separated from the offices of the Church ; and no man who has formed a judgment of the doctrinal or practical evils of religious separation, will acquiesce with pleasure in this primary result, or contemplate without regret, the absolute and irrevocable, although voluntary, excommunication of an erring brotherhood. It will be an ambiguous benefit, which, under the name of a favour, reduces the Unitarians, in respect of marriage, to a level with the Jews ; and it will be an anomaly in ecclesiastical policy, to confer a privilege on the most hostile, which is not conceded to the most friendly of the sects. If the concession is limited to the Unitarians, it will have the effect of offering a bounty on the Unitarian doctrine ; and any man who may take offence at the ritual of the Church, may be free to avoid conformity by the profession of Unitarian tenets. If however the principle is conceded to the Unitarians, it will be impossible to withhold it from other classes of dissenters, who will all naturally plead their respective grievances and claims of relief: and when the infinite modifications of dissent are considered, especially in the metropolis and in the populous and remote districts of the country, it will

not be easy to secure the registration of marriage, or to prevent the abuses of the licence, and the revived practice of clandestinity. Boys and girls, by becoming fanatics, will overcome all difficulties in the contract of marriage. It is true, that the possible or even the probable abuse is not a fair objection to a principle: but when the principle is originally bad, it is not excused by the probable fault of its practice. The effects and details of the measure are of far less consequence than the principle; but even these are not inconsiderable. It may be very doubtful, whether the measure will be acceptable to all who profess Unitarian principles; and whether many who now take an interest in its success, will not continue to prefer the ritual of the established Church, for the sake of the increased security afforded by the registration of marriages; and whether, when the principle has been extorted by a claim of right, the practice will not be confined to a few of the most sanguine and enthusiastical of its supporters. It is not a matter which deserves a moment's consideration, that the measure has a tendency to reduce the fees and emoluments of the clergy. A matter so entirely secular may be fairly overlooked, in contemplating the greater evils, which threaten to accompany the success of the experiment. It may never be extensively adopted, and the pecuniary injury may be but trivial. If the religious principle is abandoned, the Church will be insulted by a precautionary clause for protecting its little fees, in a Bill which cancels its solemn offices. Marriage, it should be remembered, was originally a sacrament, and, as a sacrament, no fee could be due for its ad-

ministration. Marriage fees must be of right subsequent to the Reformation, or rather the title to the demand is dependent upon special custom, and involves the actual performance of the duty[e]: and where the religious solemnization of the marriage is superseded, there is no ground on which the fees can be protected. The Church asks not the gifts of Unitarian bounty; the poor Unitarian will be offended by the demand, which he will not scruple to denounce as an act of ecclesiastical extortion. It has been proposed with some address that the fees shall be retained, and that the retention shall be vindicated in consideration of a service to be performed, which is no other than the record of the marriage in the Parochial Registers. The Registers now in use cannot be accommodated to this suggestion: they are adapted to the use of persons married *in* the church, and *by* the clergyman, recording the act; and it is incompatible with the whole scheme of parochial registration for a clergyman to attest or record any act which he has not himself performed. If this difficulty could be arranged, the marriage of Unitarians would stand on grounds very different from those of the Quakers and the Jews.

Whether the alleged grievances of the Unitarians may or may not be redressed by the wisdom of the legislature, it is certain that under the present state of the law there is but one form for the legal ratification of marriage in England. The Unitarian is free to avail himself of a foreign marriage, but a legal marriage cannot be contracted in England, but

[e] Burn's Ecclesiastical Law.

in conformity with the ritual of the Church. It is more than idle therefore to pretend to consult the clergyman, or to argue with him the difficulties of the case: he is bound by his oath of canonical obedience to administer the rites of the Church, which he has no authority or discretion to alter or curtail, and which if he should venture to alter, the marriage might be of doubtful and disputable validity, and the parties would have the prudence to refuse a privilege which they have now the temerity to solicit. It is more than idle to offer what the parties call a protest, which is to the clergyman no more than so much blank paper, of which he can take no notice, and which can bind him to no sort of action. It is more than idle to accuse the unaccommodating intolerance of the clergyman, whose presence might or might not be demanded, but whose presence can only be required for the performance of specific duties in a specific form. It is more than idle to interrupt the public service by expressions of hostility, which can operate in nothing but the aggravation of evil. The office is not sensible of the contempt; the officer has given no cause of offence, and is gratuitously insulted. Freethinking Christians might have been expected to allow others to think as freely as themselves, and unless they lay an exclusive claim to infallibility, as well as freedom of thought, it would be no extraordinary effort of liberality to conceive, that others may be as sincere in believing as they are in disbelieving a particular doctrine. They complain of injury in respect of the compulsory use of the office; but can they expect to be believed in their plea, when they volun-

tarily appear as the witnesses of ceremonies which they profess to hold in abhorrence? And is there not a secret mind and spirit of persecution in pretending an official interference, in assuming a right and authority to make objections which cannot be removed, of offering protests which cannot but be impertinent and unmeaning, and in recording offences which nothing but their own folly has provoked. The man who draws down injury upon himself has the redress in his own power, because he may avoid it. If the Freethinking Christian has reason to complain of a grievance in the necessity of his own marriage, he has not the same plea, the fault is exclusively his own, when he is the mere witness of the marriage of another. When it is urged, that if certain expressions are "read before young females and children they are extremely revolting," is it not obvious to ask, Is there any occasion for their being read before them? May not their presence be dispensed with? And is not the fault chiefly with those who do not keep them away? The rudeness of turning the back upon the ceremony; the suspension of the voice, and the declaration of dissent between certain words; the occasional refusal to repeat those words; the frequent appearance at a ritual which is not approved; the paltry advantage which is taken in recording the perplexities, the hesitations, the scruples, the remarks, the occupations, the defects of temper or of manners, in the clergy with whom it is professed to confer; all which the Freethinking Christians have recorded[f] of their own conduct, is

[f] Freethinking Christians' Quarterly Register, No. iii.

calculated only to exasperate and offend; can be read only with a blush of shame by the moderate men of their own party; and should abate the zeal of any but a partial or interested advocate, as it will assuredly increase and confirm the honest objections of their adversaries.

The religious ratification of marriage has been shewn to be part of the ancient and common law of England, from which none but Jews and Quakers have ever been exempted; and it is conceived, that the further extension of this licence would be highly inexpedient, as involving the concession of a valuable principle, introductory of many and great inconveniences, and not calculated to satisfy the wants of any but the most inconsiderate of those who profess to desire it. In the general ignorance of the true merits of the question the importunity of the petitioners may nevertheless prevail; and if a compromise can be made, without betraying the great principle of the religious ratification of marriage, it is the interest of all parties that it should be concerted. If all sects are required to comply with a particular ritual for the solemnization of marriage, it is certainly desirable, that that ritual should be of the simplest and most unexceptionable form: and if in the present circumstances of religious division in England, a formulary of marriage was now to be constructed for the general use, there can be no doubt, that it would be constructed on the most general principles, and that, as it would also be required for the use of all classes, the educated and the uneducated, it would be expressed in terms the most plain and easy to be understood. It was the

objection of Doctor Johnson, that "our marriage service is too refined; it is calculated only for the best kind of marriages, whereas we should have a form for matches of convenience, of which there are many[g]." This was the fault of its origin in an age when but little attention was paid to the wants of the great body of the people, and they were hardly admitted to the rights of marriage: and there are but few who will contend that the existing ritual is marked by a character of comprehensive simplicity, or that it is so excellent in itself as not to require and not to admit improvement. The rejection of such a curtailment of the ritual as should leave nothing which might be called a religious ratification of marriage has been generally and justly approved; but a wish has at the same time been expressed, that certain parts of the service should be amended or suppressed. It is objected, that there are parts in which the sentiment is indelicate; in which the expression is obsolete or obscure: and, so far as the particular objections of the Unitarians are worthy of attention, there is a necessity of entering upon the very delicate question, How far the recognition of the doctrine of the Trinity is requisite to the solemnization of matrimony? How far it is necessary that marriage should be solemnized in the name of the Father, and of the Son, and of the Holy Ghost? The candour of the reader is especially intreated in the discussion of these questions, which involves the expedience of a review of the Office for the Solemnization of Matrimony, with suggestions for its

[g] Boswell's Life; the year 1769.

amendment, the results of frequent and serious meditation.

It is objected, and can hardly be denied, that there is an offensive indelicacy of expression in the introductory sentences of the Office of Matrimony, which are usually defended with the equivocal and evasive apology, that where the mind is not corrupted improper ideas will not be entertained, and that at the time in which the office was compiled there was no such offence in the language as is imputed by the fastidious refinement of the present day. It is not improbable that the real purity of our manners has not corresponded with the studied purity of our oral conversation; and there may have been as much modesty in the age of Congreve and of Dryden as in that of Cumberland: but the true question at issue is, Whether the language of the Office of Matrimony is such as it becomes a holy man to address to a modest and virtuous woman? And it is difficult to answer this question without qualification or reserve. It is not necessary upon all occasions and without discrimination to affirm that marriage should not be taken in hand wantonly, to satisfy men's carnal lusts and appetites, like brute beasts that have no understanding; or that marriage was ordained for a remedy against sin, and to avoid fornication, that such persons as have not the gift of continency might marry and keep themselves undefiled members of Christ's body. In some cases the admonition is too late; in others it is not demanded, it is not justified by the circumstances. In the case of many young persons there are pure motives of marriage; and the assertions are irrelevant in the

case of persons of advanced years, when a certain prayer is ordered to be omitted, and the reference to what is called the first end of marriage is altogether inappropriate. The allusion to the gift of continency is more worthy of the Romish doctrine of celibacy, than of any view of marriage maintained in a Protestant Church, or exhibited in the Scriptures, in which the apostle[h] speaks only of an actual state of incontinence, for which he recommends the remedy of marriage, which he would otherwise have discountenanced as unsuitable to the circumstances of the age in which he wrote; and it is a just argument against the Romanists that marriage was ordained in the state of innocence, and can therefore be only casually, not primarily, intended as a remedy against sin. The general assertion of the remedial use of marriage is founded in an inveterate misconception of the words of the apostle[i] in referring to the case of the heathen who had been married before their conversion to the truth, and whom he instructs not to take wives to themselves, but to have, to retain, and keep possession of the respective consorts to whom they had been previously married. The Freethinking Christians have put their opinions upon the indelicacy of the service upon record, and the truth of their representation is but too strongly confirmed by the conduct of many clergymen, who blush to recite the whole of the introductory sentences, which they take upon themselves to omit. It is a very critical situation in which the clergy are placed, when they cannot use the public offices of

[h] 1 Cor. vii. 9. [i] 1 Cor. vii. 2.

the Church without offence, without exciting, even where it might be least expected, a blush or a smile, and when they are tempted to avoid the offence, to resort to practices which are unlawful and cannot be defended. The frequent omission of certain passages in the Office for the Solemnization of Matrimony, the general misapprehension or neglect of the instructions of the rubric, in respect of the different places of the church in which the different parts of the office should be performed, and the occasional disuse of the concluding sentences, are all matters of common notoriety, and offer a strong argument for the public and authoritative revision of the office, without which they suggest and seem to justify the claim for private omissions and compliances. If the indelicate passages are omitted in deference to the feelings of one party, it is argued, that the doctrine may be compromised to the scruples of another, and thus the offices of the Church will be varied in accommodation to the arbitrary humours of individuals. The order in which the causes of matrimony are arranged in the public ritual is singularly inverted. The mutual society, help, and comfort, which is unquestionably the primary motive of marriage, is stated to be the third; and the religious education of children, which is dependent on the matrimonial union of the parents, is described to be the first. The casual benefit occupies the intermediate place.

In the American liturgy[k], the Gordian knot is cut by the omission of the objectionable passages: if any revision of the English formulary should be

[k] See Appendix, No. III.

judged expedient, it is suggested that a compilation might be formed of the principal sentences of Scripture which relate to the ends and duties of marriage, on the model of the admirable exhortation in the Commination Office, in the use of which all objections would be suppressed, and the recitation of the final sentences, which in their present form are subject to the charge of redundance, would be unnecessary, and might be superseded.

Another objection, on the ground of indelicacy, is commonly made to the second prayer after the psalm, in which the allusion is more distinct than the occasion may seem to require. This prayer is also omitted in the American liturgy, and not unfrequently abridged or disused in the administrations of the Church of England. It is a cause of deep regret, that the attention of the Reformers of the Office was not in this respect directed to the Greek liturgy, in which an elegant and unexceptionable allusion is made to Psalm cxxvii. 3,[1] and the end is adequately prayed for without any reference to the means. Might not the difficulty be removed by an alteration, in the form of invocation, founded on Malachi ii. 15, and Psalm cxxvii. 3, with a brief omission; O God, who hast ordained matrimony for the continuance of a godly seed, and of whom children and the fruit of the womb are the gift and heritage, grant to these thy servants that they may live together, &c.

A second ground of objections to the existing

[1] Χαριται αυτοις καρπον κοιλιας, ευτεκνιας απολαυσιν. See Appendix, No. III.

Office of Matrimony is the obscurity of the terms which the man is directed to use in giving the ring to the woman. In the old Romish missals of Sarum and of York, which were anciently in use in the northern and southern parts of the kingdom, the mutual stipulation of the parties, and the words used in giving the ring, were in English, while all the rest of the service was in Latin. There cannot be a clearer proof of the acknowledged expedience of giving the utmost perspicuity to the vow of marriage; and from these missals, with the omission of various superstitions, our present forms are collected. With the exception of the word *troth*, commonly mistaken for *truth*, the form of interrogation by the curate, and of mutual stipulation between the parties, is perfectly clear and unexceptionable. The words of the man in giving the ring are liable to various objections. The form of the ancient missal of York was, "With this ring I wedde the: and with this gold and silver I honour the: and with this gift I honour the: In the name," &c. In the Salisbury missal, which is the principal model of our own, the form was, "With this ring I the wed: and this gold and silver I the give: and with my body I the worshipe: and with all my worldly chatel I the endowe: In the name," &c. With the exception of the omission of the words, And this gold and silver I the give, which were appropriated to the gift of "other tokens of spousage" beside the ring, of the substitution of the word *goods* for *chattel*, and the disuse of various crossings, this ancient formulary, as it was revised in the books of Edward VI. is retained in the present day.

The first objection applies to the words, "With my body I thee worship." Worship, as in other writings of the age[m], is unquestionably used in the sense, not of religious adoration, but of civil honour and respect. It retains the same sense in the familiar phrases of Your Worship, the Right Worshipful, in the use of which no man entertains, or is suspected of entertaining, an idea of religious apostacy, or of detracting from the worship which is due to the only God. The objection is nevertheless as old as the revision of the liturgy at the Restoration, when it was agreed, but the agreement was not fulfilled, that the word *honour* should be substituted for *worship*. Still even under this interpretation it is not easy to conceive, what meaning ever was or ever can be attached to the words, "With my body I thee worship, or honour:" and the general ignorance of the people and the objections of the adversary are hardly counteracted by the subtle exposition of ritualists. It cannot be meant, that the man accompanies the words with an inclination of the head, or that, in a

[m] Shepherd notices the old version of 1 Sam. ii. 30, "Him that worships me I will worship." So in the authorized version, Luke xiv. 10, Then shalt thou have worship in the presence of them that sit at meat with thee. In the Bishops' Bible, Psalm viii. 5, Thou shalt crown him with glory and worship, is changed in the authorized version into glory and honour. So "I, according to the word of God, will worship, honour, maintain, and govern thee," as Godwin translates the Bill of dowry. Moses and Aaron, l. vi. c. 4. Can it then be in mere ignorance that it is objected, that "the man is required to worship the woman, though the divine Founder of Christianity has declared, that God is the only object for the Christian to worship?"

style of inverted adulation, he proposes to honour the woman by offering himself to her as her husband. Wheatly[n] affirms, that "the design of it is to express that the woman by virtue of this marriage has a share in all the honours and titles which are due or belong to the person of her husband." This is a periphrasis, which the words will hardly bear, which will occur to none but a professed student in theology; and even if its meaning could be established it is implied in the subsequent clause, for these personal honours are but a part of the worldly goods with which the man endows the woman. Hooker labours to interpret the words in three different senses; 1. by contrasting the honour of lawful marriage with "the stain, blemish, or disgrace," of unlawful intercourse; 2. as "the imparting of that interest in the body unto another, which none had before save only ourselves:" but to this sense he himself objects that the words should, under this interpretation, be used by both parties: 3. "in professing that his intent was to add by his person worship and honour unto hers, he took her plainly and clearly unto wife. . . . The worship that grew unto her being taken with declaration of this intent was, that her children became by this means legitimate and free; herself was made a mother over his family; last of all, she received such advancement of state as things annexed unto his person might augment her with: yea, a right of participation was thereby given her both in him and in all things that were his. This does somewhat more plainly appear

[n] Illustration of Common Prayer.

by adding also that other clause, With all my worldly goods I thee endow. The former branch having granted the principle, the latter granteth that which is annexed thereunto[n]." But does not the term "all my worldly goods" include all possible advantages which may arise from the marriage? And is any of these meanings so clearly and definitely expressed as to fall within the apprehension of all persons who are required to use the words? Selden translates them, "*Corpore meo te dignor:*" the American liturgy resolves the difficulty by omitting the clause; and until the words shall be more distinctly explained than they hitherto have been, this concise example may not be unworthy of imitation.

The succeeding clause, "And with all my worldly goods I thee endow," is highly inappropriate in a very vast majority of marriages. Among the poor, and among those who marry with equal fortunes, a very numerous class, the gift and the receipt of worldly goods is either negative or mutual: there is nothing given which is not received; there is but the union of private or the participation of common interests. In the marriage of a widow, or in a marriage without settlements, the man seems to take to himself the worldly goods of the woman; and there is no case in which he alienates to her his own right of property. By a legal arrangement, indeed, the woman, in contemplation of the marriage, either by herself or her guardians, makes over her whole property, with or without reservation, to the man;

[n] Eccl. Pol. b. v. s. 73.

and the man, in the act of marriage, admits her to a participation in all his worldly goods, as well those which were originally his own, as those which were formerly hers, but devolved upon him by the previous settlements. If in reference to this case the primary and final clauses be coupled together, without the intervention of the second, and with a right apprehension of the word *wed* in the sense of covenanting or contracting, a very adequate sense will result: I wed and form a covenant with thee with this ring, which is the sign and token that I endow thee and admit thee to the free use, and to a common share, of all my worldly goods. Blackstone thus compares the ancient practice with the modern ritual: "When special endowments were made at the door of the church, the husband, after affiance made and troth plighted, used to declare with what specific lands he meant to endow his wife. When the wife was endowed generally, he seems to have said, With all my lands and tenements I thee endow: and then they all became liable to her dower. When he endowed her with personalty only he used to say, With all my worldly goods (or, as the Salisbury ritual has it, with all my worldly chattel) I thee endow: which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate . . . the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture out of her husband's personalty[o]."

The ancient notion, that the ring was placed on

[o] 2 Bl. Com. c. 8. n. p.

the fourth finger of the left hand, because a vein proceeded from that finger to the heart[p], has been superseded by the more exact discoveries of anatomy. The ring has nevertheless its use and meaning, derived from remote antiquity. It is not improbably the remains of the ancient form of marriage by coemption, in which the arrha, or earnest and pledge, given at the time of the espousals, commonly consisted of a ring, thence called *pronubus annulus*, sometimes of iron, and without a gem, according to Pliny, but more frequently of gold, according to Tertullian; and Clemens of Alexandria affirms, that it was given, not for ornament only, but to signify the domestic possessions, which were worthy of care and the superintendence of the household[q]. Hence to espouse was sometimes called *subarrho*, which is the word used by Selden, as the translation of to *wed;* as is also the word ἀρραβωνιζομαι in the Greek Liturgy: and with reference to this ancient custom, it may signify in the present use of the Church, that the woman, in consideration of a certain dowry, contracted for by the man, of which the ring is the earnest and pledge, espouses and makes herself over to him as his wife; and the ring, thus given and received, is called a token and pledge of the vow and covenant betwixt them made.

It is known that the Romans used the ring in contracts, instead of a bill or bond; and its use might be introduced into the marriage contract,

[p] Isidor. de Div. Off. l. ii. c. 19.

[q] Cl. Alex. Pæd. l. iii. c. 2. Fr. Hotman de Vet. Rit. Nupt. c. 10. A. Hotman de Sponsalibus, c. 3.

"from the ancient way of expressing esteem for any person by giving him a ring. The ring was originally used for a signet or seal; and the act of delivering a ring to another, denoted that the receiver was considered by the giver as the confidant of his secrets, the partner in his counsels, and sometimes the sharer of his property. The giving of a ring was likewise the ordinary rite or pledge of investing any one with honour or power[r]." The ring, which was anciently crowned with a seal, may thus denote the seal of the covenant, which is completed in marriage with the admission of the woman to the counsels of her husband, and to a participation of his honour and estate; and by its circular form it may denote the uninterrupted continuity and constancy of affection, with which married persons should be inspired, whose conjugal love should never have an end[s]. "The ring," saith Hooker, "hath been always used as a special pledge of faith and fidelity; nothing more fit to serve as a token of our purposed endless continuance in that which we ought never to revoke. . . . The cause why the Christians use it, as some of the ancient fathers think, is either to testify mutual love, or rather to serve as a pledge of conjunction in heart and mind agreed upon between them[t]." The public use of the ring is also a convenient distinction between the married and the unmarried woman; a distinction which may be violated, but which no virtuous maiden will venture to assume, and which no modest matron will not scorn to disuse.

[r] Shepherd's Elucidation.

[s] Wheatly's Illustration.

[t] Eccl. Pol. b. v. s. 73.

In the use of the Church of Rome, the gift of the ring is preceded by various superstitious rites; a benediction is prayed upon it, and it is again and again crossed by the priest. It was also anciently accompanied by a gift of gold and silver[u]; and, as appears from the first book of Edward VI. it was usual to give a purse of money, which was probably superseded because the gift was not in all cases convenient, and the intention was fulfilled by the ring alone. The declaration of endowment with all worldly goods is but a more full avowal of the true meaning of the ring, in virtue of which the woman becomes entitled, from the moment of stipulation, to maintenance during her life, and to a third or larger portion of the goods of her husband after his decease. The full meaning of the man, in his words and in the act of giving the ring, may thus be paraphrased: I wed thee with this ring, which is the pledge of a covenant between thee and me, of unbroken love and confidence; and from henceforth, as we are made one in marriage, and have but one interest in all worldly goods, I pray that we may be joined together in one heart and one mind, and have the same affection in all things. The most ancient of ritualists[x] concurs in this exposition, when he says that a ring was given by the bridegroom to the bride, either as a sign of mutual faith, or

[u] There is no end of conceits. "In sonoritate argenti designatur interna dilectio quæ semper inter eos debet esse recens." Manuale sec. usum Sarum. So when the ring was of iron, then was "the metal hard and durable, signifying the durance and perpetuity of the contract." Swinburn in Burn.

[x] Isidor. de Div. Off. l. ii. c. 19.

because their hearts are joined together by the same pledge.

The contract of marriage is ratified in the name of the Father, and of the Son, and of the Holy Ghost: the priest pronounces the parties to be man and wife in the same name; and a blessing is pronounced upon them in terms founded on that grand, sublime, and mysterious doctrine. Centuries have passed away, without any objection to this solemn adjuration and appeal, and the novelty of the discussion might seem alone to suggest the necessity of the utmost temper and discretion in approaching it. When the Freethinking Christians, therefore, in protesting against the office of matrimony, take occasion to declare, that they not only disbelieve but "abominate the doctrine of the Trinity, in whose name the marriage ceremony is performed," and to represent it "as one of the many lamentable corruptions of Christianity, alike repugnant to reason and contrary to Scripture;" they not only betray their own indiscretion, but they multiply the subjects in dispute, at the same time that they preclude a favourable issue of the controversy, and supply the means of evading the principal question; because the clergy of the Church of England cannot acquiesce in the imputation of absurdity, falsehood, and corruption, to doctrines which they have learned to believe, in as perfect sincerity, upon as diligent and patient investigation, and with as full conviction, as the body of Unitarians have been persuaded to deny them. If therefore the truth and authenticity of the doctrine of the Trinity are called in question, there can be no compromise; that doctrine must be

maintained in its full extent; and no concession can be made which involves the shadow of a doubt or dereliction of that fundamental truth.

It is very true, that the office of matrimony implies a recognition of the doctrine of the Trinity, in whose name it is performed; but it is not immaterial to observe, that that recognition, as it is recited by the man, is expressed in the very words of Scripture. The man does not take the woman, as it is familiarly but not accurately observed, in the name of the Trinity, but in the name of the Father, and of the Son, and of the Holy Ghost. In the former case the man might at once deny the doctrine, and pretend that it was an unauthorized inference from Scripture: but in respect of the actual formulary, although there may be some ambiguity, and an appearance of disingenuousness, in the minister's dictating the words in one sense, and the man's repeating them in another, yet are they words of authentic Scripture, which both parties may interpret according to their respective rules of exposition. "If conscience had any share in the objections which Unitarians make to the language of the marriage service, they must equally object to the Scriptures themselves; for the obnoxious terms are the express words of the New Testament, and are retained by the Unitarians in their translation of the New Testament; and, incredible as such inconsistency may appear, they are the very words of their own baptismal office, and are there introduced as the foundation of the Christian faith. Whatever meaning, therefore, they may be accustomed to attach to the words in one service, they may equally

retain in the other[y]." In their objections to this formulary in the office of marriage, the Unitarians expose themselves to the charge of singular inconsistency. If they admit, as they profess to admit, the authority of the Scriptures, without disputing the authenticity of the words of our Lord, Matt. xxviii. 19, and nevertheless object to the use of those words because the use of them implies a recognition of the doctrine of the Trinity, (and the objection of the Freethinking Christians is unquestionably founded on the use of those words,) do they not virtually, although unintentionally, acknowledge, that the doctrine of the Trinity is contained in those words, at the same time that they affirm of that doctrine, that it is contrary to Scripture? And are they not also liable to the charge of insincerity to themselves, in professing to uphold the authority of the Scriptures, and denying the doctrine which it confessedly recognizes and implies? and of disingenuousness to the public, in claiming relief from an imputed grievance, on the pretext that it implies the recognition of a doctrine which they profess to be at once implied in the Scriptures and contrary to the Scriptures?

There is nevertheless a question, a highly delicate question, which is worthy of the most serious discussion, and probably, if it be treated with candour and forbearance, not incapable of eventual adjustment. That question is, Whether the solemnization of marriage necessarily requires a recognition of the doctrine of the Trinity? Whether it is essential to

[y] Speech of the Bishop (Burgess) of St. David's, on the Unitarian Bill.

the nature of marriage that it be ratified in the name of the Father, and of the Son, and of the Holy Ghost? Baptism, it is conceived, can be administered in no other name: it is the formulary divinely appointed for the administration of that sacrament, in all nations, and until the end of time; which no human being is at liberty to alter or disuse. But the application to other rites of the mysterious name, which is divinely appropriated to baptism, is but the ordinance of man, and may be superseded by the authority of man. There is the most ancient, the most constant, and the most uninterrupted tradition of the use of this name in the administration of baptism, while the origin of its improper use is uncertain and obscure. One of the earliest instances which has been discovered after some inquiry, is on occasion of the infusion of the bread into the wine of the Eucharist, upon which this name is recited in the Liturgy of Saint James: but the work is certainly not authentic, and in its present state not more ancient than the time of Constantine. The same name is used by Cyprian, in an act of excommunication; and it occurs in the same sense in the apostolical history of James the Great, a work comparatively modern, and of no value or authority. There is no trace of its use in respect of marriage, in any of the writings of the three first centuries; nor in the Summary of the writings of Augustin, published by the Jesuit, Hieronymus Torrensis; nor in the account which Isidore of Seville[z] has left of the rites of marriage in his time; nor in the form of blessing the

[z] De Div. Off. l. ii. c. 19.

bride in the Ordo Romanus, and the ancient liturgies of the Latin Church, published by Muratori; all of which are supposed to have been compiled before the ninth century, and which consist chiefly of prayers subsequent to the espousals[a]; and although marriage has been since celebrated in this name in the Greek and Latin Churches, in the Lutheran Churches of the continent, and in the Episcopal Churches of Scotland and of America, there is no trace of the time or the occasion of its introduction. Men appear not prepared to investigate the origin of its misuse; they are surprised by the novelty of the question, and unable to resolve it any further, than by suggesting the probability that the celebration of marriage in this name was coeval with its elevation to the character of a sacrament.

It has been said, that the Church of England rests on the doctrine of the Trinity; and the saying is just, because the Church of England rests on the Scriptures, which admit no harmonious interpretation from which the doctrine of the Trinity is excluded. With the exception, however, of the offices of baptism, to which it is indispensable, and to which, as it is humbly conceived, its strict reservation would be most agreeable to the divine institution, there is no office of the Church, in which this divine formulary occurs, besides the office for the solemnization of marriage, to which it is less necessary and appropriate, and in which its place might be easily supplied by an unexceptionable allusion to the words of Scripture: The Lord hath

[a] See Appendix, No. III.

been witness between thee and the wife of thy youth[b]. If the name of the Father, and of the Son, and of the Holy Ghost, should thus be removed from the man's avowal of the covenant, the declaration of the marriage by the minister might be positively affirmed, and there would be no difficulty in arranging the form of the nuptial benediction[c]. The final benediction in the present office, in which it is singular that there is no allusion to the doctrine of the Trinity, nor even to the mediation of Christ, might immediately follow the publication of the marriage, as in the American liturgy, from which the benediction, "God the Father," &c. is expunged, without throwing any suspicion on the faith of the American Church, which explicitly maintains the doctrine of the Trinity. It is suggested also, whether the Psalm which ought to accompany the procession from the body of the Church to the Lord's Table, might not be conveniently transferred to the end of the prayers, and precede the final blessing, which might consist of the sublime benediction of the Apostle, Heb. xiii. 21, 22.

In adopting from the Romish missals the words used in the delivery of the ring, the compilers of the liturgy were not servile copyists of the ancient superstitions. Formerly the ring was placed upon the thumb and the three adjoining fingers, and the man was directed to say, as he touched the thumb with

[b] Mal. ii. 14.

[c] The ancient form was, Benedicti + sitis a Domino, qui mundum fecit ex nihilo. See Appendix, No. III.

the ring, In the name of the Father; and to make a cross: as he touched the forefinger with the ring, he proceeded, and of the Son; and made another cross: as he touched the third finger he added, and of the Holy Ghost; with another cross: and as he deposited the ring on the fourth finger he said, Amen; making another cross. A prayer and benediction were also delivered over the ring, before it was given by the priest to the man. It would be analogous to the disuse of these prayers, that the man should deliver the ring directly to the woman.

The old superstitions were not unworthy to be called "the mummery of the ring," and were very properly abolished: and no Unitarian, however he may object to the office now in use, can fail of observing, that the only words which he is required to repeat, are words of canonical Scripture. He may disapprove the use of the Triune name upon the occasion, and allege the appearance of disingenuousness and equivocation, under which the words are dictated by the minister in one sense, and repeated by the bridegroom in another; but they are nevertheless scriptural words, and admit, according to the principles of each, a scriptural interpretation. It is suggested to the temperate, candid, and honest Unitarian, not without hope, that he may see that there is the most imminent danger in granting to him a licence to marry in his private conventicle, which will afterwards be claimed by every fanatic in credulity and unbelief: that even the existing ritual, in the words which he is required to use, lays no burthen upon conscience, which is not founded in Scripture, and may be so revised as to satisfy his

most sensitive and delicate scruples. The case of the Freethinking Christians, as stated by themselves, is more desperate; and the difficulty of accommodation to a sceptical frenzy only increases the danger of concession. The registration of marriage would be as just a grievance as an act of social prayer; and it is worthy of remark, that the advocates of the Unitarians do not profess to offer relief to the Freethinking Christians. The best proof, however, of the irrelevance of the objection to "the interference of any human institution with matters which concern their faith and conscience," is derived from the principles and practice of the great body of dissenters, who, treating marriage as a civil affair, submit to the will of the magistrate in regard to the circumstances of the rite, without complaining of oppression or soliciting redress.

To such as would concede, and are offended with those who scruple to concede, to Unitarians in particular or to dissenters in general, the privilege of marrying in their several conventicles, it is submitted, that the concession involves no less than the abandonment of the religious ratification of marriage, and the degradation of marriage to a merely civil contract. Such concession cannot be made without violating the common law of England, which has always upheld the religious ratification, and the established practice of the Church, in which it has prevailed from time immemorial: and the effect of a general concession, unavoidably resulting from a particular concession, may be the means of renewing the facilities of clandestine marriage to an extent, and with a force, which it may be difficult to re-

strain. The acquiescence of the great body of dissenters, under the existing law and ritual, is an unexceptionable proof of the inexpedience of the proposed concession.

It has not been concealed, that the ritual of the Church is liable to many and just objections: and an attempt has been made to shew that they may all be removed by a judicious revision, without the compromise of any necessary doctrine, and as is humbly conceived, to the improvement, and therefore to the confirmed stability, of the English liturgy. The proposition has been conceived in secret, and matured in solitary meditation; it is not adapted to the views of the bigot or the partizan; and it is submitted, not in the mere love of innovation, or the idle ambition of inconsiderate reform, but in all humble earnestness and zeal for the purity of Christian doctrine and worship, to the scholar, the gentleman, the Christian, the wise and enlightened governors of the national Church. The revision of an unexceptionable formulary is a debt which the Church owes to her own character, which requires the removal of every offence, and the administration of all her offices in apostolic decency and order: it is an act of appropriate sympathy with the delicate feelings of many clergymen, who are equally averse from the use and the disuse of the authorized form: it is a work of wisdom and address, which will restore uniformity in the celebration of the office, and by removing objections, of whatever value, will uphold the continuance of the religious ratification of marriage; and will exhibit a new proof of the tolerance and moderation of the Church, and of her

concern for the welfare of all who profess and call themselves Christians: it is an office of the largest and most unbounded charity, not to give countenance to the errors, not to justify the objections, not to exasperate the prejudices, not to promote the entire separation, of any sectarian body, but to seek, in the divisions which unhappily prevail under the name of religion, the reunion of the Christian body, and to persuade each and every member of it to perceive and acknowledge, through the perfection of her ritual, that the beauty of holiness is manifest in all the offices of the Church of England.

CHAPTER III.

IMPEDIMENTS WHICH PRECLUDE AND VITIATE THE CONTRACT OF MARRIAGE.

SECTION I.

Incestuous and Illicit Marriages.

THE acknowledgment of the divine institution of marriage combined with a just view of the comprehensive terms in which that institution is delivered, and of the indissoluble nature of the relation which is contracted in conformity with that institution, imposes the necessity of the most rigid and scrupulous care in respect of the circumstances under which the celebration of marriage shall be prohibited, and the ratification of marriage shall be superseded and annulled by the provisions of human laws. The history of the divine institution is recorded in terms the most comprehensive and unlimited. It was not good in the judgment of the divine wisdom that man should be alone; woman was created to be an help meet for him: and when they were brought together it was ordained, that for this cause a man should leave his father and mother, and cleave unto his woman, or wife, and they should be one flesh[a]. It will not be denied, that the words *man*

[a] Gen. ii. 24. Ainsworth in loc.

and *woman* are here used reciprocally, that the man should leave his parents and the woman should leave her parents, and that they should mutually cleave to each other: neither will it be denied, that the words *man* and *woman* are also used distributively in the widest and most indefinite sense for the freedom and power possessed by each and every man to enter into the state of matrimony. The nature of marriage exhibited in the primary law is, that the parties shall cleave to each other in such permanent and indissoluble union, that they two shall become one flesh. It is an unavoidable conclusion from this view of the divine institution, that all laws which have been enacted at various periods for the purpose of prohibiting marriage among particular classes or orders of mankind, as of slaves and of the priesthood, or of annulling the marriages which have been contracted in opposition to any arbitrary restrictions, are at once an unjust infringement of human liberty, and a daring contravention of divine authority.

It would at the same time be vain to assert, that the primary law of marriage admits no exception or qualification. It is easy to conceive, that a marriage may be contracted in opposition to the divine institution; that it may frustrate the proposed ends of marriage; that it may be interdicted by some particular restrictions of divine authority, which form a case of exception to the general law and liberty of marriage. Marriages contracted under any of these circumstances would want the authority of divine institution, which is the grand principle of valid marriage, and being contrary to the ordinance of

God, they could not be ratified in his name and with a religious and solemn invocation of his blessing. The union would depend upon terms so different from those which God's word doth allow as to justify the assertion, that the parties were not joined together by God, and that their marriage was not lawful.

It is of importance to ascertain what are these characters of invalidity and prohibition, not only as they are unfolded in the divine institution, but as they are found to prevail, with various modifications, in all ages, in all countries, and under all dispensations of religion, with a frequency and concurrence which almost argues and implies some universal, primeval, and divine prohibition, from which the restrictions of men have been collected and deduced. An instinct, almost innate and universal, appears to prohibit the incestuous marriage of parents and children, and the evils inseparable from the necessary disparity of years, the difference of tempers and pursuits, and the probabilities of an early widowhood and orphanage, are alone sufficient to form the reasonableness of the prohibition. The prohibition also corresponds with the natural sense of propriety, and is necessary to maintain the distinct relations of society, and the duties appropriate to those relations. The reverence which the child owes to the parent would be immediately inverted by the marriage of a son with a mother, or a daughter with a father: and it would be a strange confusion of kindred, under which a woman should be the wife of her son, or the mother of her husband, and a man be the brother of

his own children[b]. The easy familiarity, the mutual confidence, and the delicate forbearance, which form the charm of domestic life, would be immediately destroyed, as among the Druses they are in fact destroyed, by the possibility of such marriages; and in their stead would be introduced the malignant influence and unnatural restraint of jealousy, suspicion, and distrust. That purest love which a father is said to feel towards a daughter must be restrained from degenerating into a less holy passion: the heart of a mother must not be distracted with continual anxiety; and the tenderness of a sister's affections must be protected from the generous attentions of a brother. The many opportunities of early association, and the natural approximations in the dispositions of youth, would produce a prevalence of such marriages, and families would be isolated and detached from the great body of society, which by the force of the existing restrictions is consolidated, and in a condition to be more and more consolidated, by the union of one family with another, gradually extending the primary connexion of marriage, and strengthening the bonds of civil society, by repeated and enlarged affinities. There are reason therefore, and nature and necessity, and the interests of peace and virtue, both in public and in private, all pleading

[b] φανησεται δε παισι τοις αυτου ξυων
αδελφος αυτος και πατης καξ ης εφυ
γυναικος, υιος και ποσις, και του πατρος
ομοσπορος τε και φονευς. Soph. Œd. Tyr. v. 457.

εις μητρος ηλθον της ταλαιπωρου λεχος
παιδας τ' αδελφους στεκον. Eur. Phœniss. v. 1603.

together, for the establishment of some restrictions upon marriage, for restrictions which all the wise and good have approved, and which have been violated by none but the most unhappy, the most barbarous, or the most depraved[c].

These restrictions have been classed[d] under the two general heads; 1. of proximity in respect of natural relation; and 2. of disparity in respect of religious and civil distinction, of personal condition, and of age. When marriages are contracted in opposition to the restrictions of human law they are called illicit: when the restriction is founded in the Scriptures they are called incestuous or nefarious: incestuous, because they are unchaste, (*incestæ*,) or more properly in allusion to the *cestus*, or girdle, of Venus, which in a lawful marriage was worn by the woman, and loosed by the husband, as an auspicious omen of conjugal and parental happiness, and the disuse of which, in an unlawful marriage, rendered it incestuous, or ungirdled: and nefarious, either because they were without right, (*fas*,) or because those who contracted them were unworthy of the corn, (*far*,) which is the bread of life, or, if the conjecture may be allowed, because they were not contracted with the offering of corn, (*farre*,) which was usual in the most solemn marriages. It is a common and just distinction, that the power of human laws extends to the prohibition of illicit marriages, but

[c] Gibbon's Roman Empire, c. 44. Wheatly on the Common Prayer, c. x. s. 2. Gerhard de Conjug. s. 322, 323. Cic. de Off. l. i. s. 17.

[d] Gerhard, s. 238.

that none but incestuous marriages can be dissolved and rendered void after the ratification, which can only be counteracted or superseded by the authority of a divine prohibition[e].

The primary law of marriage requires, that the man shall cleave unto his wife, so that they two shall become one flesh: and thus it precludes every kind and description of adultery, of polygamy, and of community of wives: in the abandonment of the filial, and the preference of the conjugal, relation it supposes a voluntary agreement of the parties, and a capacity of fulfilling the duties of marriage, and thus precludes the marriage of children, of idiots, and of madmen, who are not capable of entering into this agreement, and whose union would disappoint the great ends of marriage, the mutual consolation of the parties, and the religious education of the progeny. The Jewish doctors have drawn a further inference from that sentence of the institution which the Chaldee paraphrase translates, He shall leave the bed of his father and mother; which they apprehend, not without reason, to be the primary and universal prohibition of all incestuous marriages, comprehended under the specific interdiction of marriage with a mother, and with a father's wife or mother-in-law[f].

From the terms of the divine institution of marriage, the Jewish doctors collect five kinds of incestuous commerce; 1. with a mother; 2. with a mother-in-law or father's wife; 3. with a neighbour's

[e] Wheatly, c. x. s. 2. Gerhard, s. 289, 292, 361. [f] Ainsworth in Gen. ii. 24.

wife; 4, 5. by unnatural passion. To these they add connexion with a sister by the mother's side, which they infer from the words of Abraham, who, in speaking of Sarah his wife, and excusing his pretence that she was his sister, admitted that she was the daughter of his father, but not the daughter of his mother[g]. These restrictions, with five other principal laws against idolatry, against blasphemy, against shedding of blood, against robbery, and concerning the punishment of malefactors, which, as they contend, were in force from the time of Adam, with a sixth, especially delivered to Noah, concerning the eating of blood with the flesh thereof, they conceive to be of universal obligation, and to comprehend all the posterity of Noah. Any man, who would not comply with these rules, was judged worthy to be slain with the sword; and any of the heathens, who would submit to these moral laws, although they rejected circumcision and the other ordinances of the Jews, were permitted to dwell in the land, even in the priests' houses, but restricted from the use of sacred things, and were called by the name of sojourners among them, or of strangers within the gates[h]. It was a disputed point among the Jewish writers, how far the Gentiles were bound to observe the restrictions imposed upon marriage in the Levitical law: but it was the general opinion of the Talmudists, that the Gentiles were only required to conform with such restrictions as were of natural law, and obligatory upon all mankind, and that,

[g] Gen. xx. 12. See Ainsworth on Gen. ix. 4. [h] Ainsworth on Gen. ix. 4. Exod. xii. 45.

although these restrictions were introduced, in company with other restrictions peculiarly appropriated to the Jews, they were under no obligation to comply with any of those particular interdictions which were not founded in the law of nature. The Israelite was bound by all the Levitical restrictions: the proselyte, or stranger within the gate, was restricted only by the six precepts of natural and universal law. The Gentiles were restricted, says Maimonides, from marrying their mothers, their fathers' wives, their sisters by the mothers' side, from adultery, and from unnatural lusts: other marriages, otherwise forbidden under the name of incest, were permitted and lawful to the Gentiles[j].

There are plain and obvious traces of the original prohibition in the practice of the two principal nations of antiquity, and of their incorporation under various modifications in the laws of Greece and Rome.

The Grecian laws of marriage were very simple, and comprised but few exceptions or restrictions. The multiplied and incestuous marriages of their fabled deities, which afforded to the primitive apologists[k] abundant matter of sarcasm and invective on the prevailing idolatry, were not allowed to influence the conduct of individuals. That the gods had their own laws, and that it was not for man to force human rites to covenants that were celestial and entirely different, was the ingenuous argument of a sister in contending with her own unlawful passion

[j] Selden, De Jure Nat. et Gen. l. v. c. 11.

[k] Theophil. ad Autolyc. l. iii. s. 8. Min. Felix. s. 21, 22. Clementin. Hom. iv. s. 16. Cf. s. 24. Hom. vi. s. 18.

for her brother. The Grecian laws required a competent age in the parties to be married, and they restricted polygamy, and marriages within certain degrees of consanguinity, and with aliens.

The laws of Sparta, without defining the exact age, required, that both men and women should maintain the full maturity of their strength before their marriage. The legislators, philosophers, and poets, of Athens were divided in their opinions of the age of marriage, which was left to men from the thirtieth to the thirty-seventh, and to women from the sixteenth to the thirtieth, year of their age[l].

Polygamy was so far from being tolerated in Greece, that the Greek word for marriage is supposed to be derived, in a singular conformity with its primitive nature and institution, from the union of two persons together, (γαμος παρα το δυο ἁμα ειναι.) Anaxandrides of Sparta, in taking a second wife, compromised his own judgment to the will of the Ephori, and the necessity of preserving the race of Eurysthenes; and it is recorded of him by Pausanias, that he was the only Spartan who had two wives; and by Herodotus, that in having two wives he acted by no means in a Spartan manner[m]. Nor was there any thing peculiar in this practice of Sparta. The other Grecian states agreed with the Lacedemonians in restricting polygamy, except upon particular emergencies, especially of a want of men arising from famine or from war, which were thought to justify, with permission of the magistrates and the

[l] Potter's Antiq. b. iv. c. 11. [m] Ουδαμως Σπαρτιητικα. Herod. Terps. s. 39, 40.

people, a more unrestricted licence. Euripides is indeed supposed to have imbibed his hatred of the sex from the persecution which he sustained under two wives: but the imputation upon Socrates, that he was married at the same time to Myrto and Xantippe, has been disputed, and in the judgment of Plutarch satisfactorily disproved[n].

Marriage was not contracted without offence within certain degrees of consanguinity[o]. The Pythagoreans[p] affirmed, that the discipline of the Grecian states required the interdiction of marriage with a mother, a daughter, and a sister. Socrates[q], from its universal prevalence, assigned the prohibition of marriage between parents and children to a natural and divine institution, of which the violation wrought its own penalty: and Plato[r] took up the argument of his master, and maintained the inexpedience of these marriages, in consideration of the evils which are inseparable from the disparity of age. Aristotle[s] also condemned the community of wives, on the ground of its tendency to produce matrimonial intercourse between parents and children, and between brothers and sisters. The common feeling of Greece upon this subject may be inferred from the history of Œdipus, which forms the most affecting tragedy of the Grecian theatre, resulting in a γαμος αγαμος, an incestuous marriage which ought not to have been

[n] Potter, b. iv. c. 11. [o] Potter. Selden de J. Nat. et Gent. l. v. c. 11. [p] Jamblich. de v. Pythag. apud Selden. [q] Xen. Mem. Socr. l. iv. c. 4. [r] De Leg. l. iv. apud Gerhard. [s] Politic. l. ii. apud Gerhard.

celebrated, and was in fact no marriage[t]. Euripides makes Hermione[u] to speak of the intermarriage of brothers with sisters, and of parents with children, as the practice of barbarians, which their laws did not restrain, but which, according to Plato, were interdicted by the unwritten law of the conscience[x]. The story of Phædra and Hippolytus disproves the lawfulness of marriage with a step-mother. The Lacedemonians were forbidden to marry any of their kindred in the direct line of ascent and descent: and the same restriction was admitted by Plato, in his imaginary republic[y]; in which he allowed marriage in all cases, with the only exception of children and children's children, of parents and the parents of parents. The marriage of collateral relations, as of uncles and nieces, aunts and nephews, was not interdicted; and thus Anaxandrides married his niece, the daughter of his sister; and Dionysius gave to Dion his daughter Arete, who was the niece of Dion, the daughter of his sister Aristomache[z]. The marriage of brothers and sisters was utterly unlawful, and the common example of the Gods was not permitted to justify an incestuous passion. The marriage of half sisters was regulated by different laws. The Spartan law of Lycurgus allowed the marriage of those who had the same mother but different fathers; the Athenians were forbidden by Solon to marry sisters by the same mother, but not those by the same

[t] *δικαζει τον αγαμον γαμον παλαι τικνουντα και τικνουμενον.* Soph. Œd. Tyr. v. 1214. Cf. v. 1256, where Jocasta is called *γυναικα τ' ου γυναικα.*

[u] In Androm. v. 173. [x] *νομον αγραφον.* apud Gerhard.

[y] De Republica, l. v. apud Selden. [z] Corn. Nep. in v. Dion.

father: nor was a man permitted to approach the apartment of his step-mother or her children, though living in the same house; which is the reason given by Mr. Hume, why, by the Athenian laws, one might marry his half sister by the father; for as these relations had no more intercourse than the men and women of different families, there was no greater danger of any criminal correspondence between them[a]. Under this law Archeptolis, the son of Themistocles, married his sister Mnesiptoleme; and Cimon married his sister Elpinice. Such marriages were entirely approved by the laws and customs of Athens; they were celebrated in public, and in undisputed conformity with the manners of the country. Cornelius Nepos[b] expressly relates, that Cimon, in marrying his sister, was influenced, not more by love than by the practice of his country, for it is the law of Athens, that a brother may marry his sister, the daughter of his father. At Syracuse also, Dionysius the elder gave to his son Dionysius his daughter Aristomache, who was the sister of her husband on the father's side[c].

The Athenian laws contained a singular exception to the prohibition of marriages upon the ground of consanguinity, which was probably derived from the Jewish law[d] of inheritance, and which not only permitted but required the orphan heiress to marry her nearest relation. Terence[e] has more than once recited the substance of this law, which ordained, that women who were orphans should marry such

[a] Millar on the Origin of Ranks, p. 95. [b] In Cimone. [c] Ibid. in Dione. [d] Numb. xxxvi. 6, 7, 8. [e] In Adelph. act iv. sc. 5. Phormione, act i. sc. 2.

as were nearest of kin, and that their nearest of kin should marry them. The law did not permit the heiress to marry out of her kindred, but obliged her to resign herself and her fortune to the nearest relation, whose claims were examined by judges who sat for the purpose every month, and rejected such as were not able to give sufficient credentials of their consanguinity[f].

The Grecian states did not allow their citizens to marry with any who were not citizens[g], and they enforced the law under various and heavy penalties, condemning the issue of a prohibited marriage with a foreigner to perpetual slavery; ordering the offender to be summoned before the Thesmothetæ, and, upon his conviction, adjudging him to be sold for a slave, and his goods to be confiscated; he was also liable to a penalty of a thousand drachmæ. If a person should impose upon a citizen of Athens a foreign woman, under pretence that she was his daughter, he was liable to a sentence of ignominy, by which he was deprived of a voice in the public assembly, and of other privileges of a citizen. These laws were not always in force; when they fell into disuse they were successively revived and superseded at the instance of Pericles; and it was ulti-

[f] Fr. Hotman de Rit. Nupt. et Matr. c. vi. Potter, b. i. c. 26.

[g] σε δ', ω τεκνον, και γαμοισι δη κλυω
ζυγεντα και παιδοποιειν αδοναν
ξενοισιν εν δομοισιν εχειν,
ξενον τε κηδος αμφεπειν.
αλαστα μητρι ταδε
Λαιῳ τε παλαιγενει
γαμων επακταν ατην. Eur. Phœn. v. 340.

mately enacted, that no persons should be citizens of Athens, either of whose parents was not free. Lawful marriage at Athens could only be celebrated between free citizens; and none but the issue of lawful marriage could inherit the father's estate. The Athenian bastard was born either of a stranger or a harlot: the characters of the legitimate son were, that he was born of a woman that was a citizen, a wife; that is, born in lawful matrimony[h].

The Roman law of marriage was embarrassed with many restrictions and prohibitions; of which some were agreeable to the primary institution, but the larger portion was founded on arbitrary principles of political expedience, very remote from the simplicity of the original rule. A cursory and superficial view of these restrictions will exhibit many curious instances of the presumption and imbecility of Roman legislation in particular, and generally of any human interference in the law of marriage. Among the Romans the validity of marriage was dependent on the several circumstances, 1. of age; 2. of country; 3. of state or condition; 4. office or power, civil or natural; 5. consanguinity and affinity, including adoption.

A certain age was necessary to the validity of marriage; but espousals were permitted at an age when marriage was not lawful. Infants under the age of seven years, being incapable of assent, could not be espoused: but after that age they might, with the sanction of their parents, contract espousals;

[h] νοθος ὁ εκ ξενης και παλλακιδος . . . . γνησιος ὁ εκ γυναικος αστης και γαμετης η εκ νομιμων γαμων. Hom. Schol. Jul. Pollux. in Potter, b. i. c. 9.

but when they attained the proper age their own consent would be also necessary to the contract of marriage. For the purpose of obtaining the rewards proposed to husbands by Augustus, in the Papian and Poppean laws, " pretended marriages were contracted with children or females under age, and the completion of course indefinitely deferred; and to prevent such evasions and frauds, it was enacted, that no marriage could be legally contracted with any female under ten years of age, nor the completion of any marriage be delayed above two years after the date of the supposed contract[i]." The principal restriction upon the age of marriage respected the capacity of giving birth to children, without which no marriage was lawful. This was generally defined to be fourteen in the male, and twelve in the female: and the law upon this point ordained, that if a girl under the age of twelve years should be contracted in marriage, she should not be esteemed a just and lawful wife[k], nor possess the privileges of a wife before she had completed her twelfth year. The lawfulness of marriage was circumscribed by the capacity in which it originated. The Julian and Papian laws declared the marriage of a man of sixty, with a woman of the age of fifty

[i] Ferguson's Rom. Republ. c. xxxviii. Fr. Hotman de Sponsal. c. 2.

[k] Fr. Hotman de Rit. Nupt. et Matr. c. 2. Hence arose a question, whether, as this was not a perfect marriage, it was a lawful betrothing; which some affirmed, on the ground that the Act was not altogether invalid; and others denied, maintaining that the essence of espousals consisted in the promise of a future marriage.

years, invalid, because it could not produce what was supposed to be the true end of marriage, and because it defeated the design of Augustus, who in the construction of these laws contemplated the renewal of the population of the city, which had been wasted by the civil wars: he was also influenced by the petition of the Trachalli, whose mother had in her old age married an old man; but Augustus restored the maternal inheritance to the sons, and took away the dower, because the marriage was not contracted upon a proper motive and principle. This part of the Papian law was rescinded by the Emperor Claudius, who procured a decree of the senate, that if a man of more than sixty should marry a woman of less than fifty years, the marriage should be as valid as if the man had been less than sixty: but if a woman of more than fifty should marry a man of less than sixty, the marriage should be unlawful, and convey no right to inheritance or dower[l]. This contemptible trifling was at least worthy of its imperial author.

Country formed another requisite qualification in the Roman marriages, which could not be lawfully contracted but between Roman citizens. The children of a foreigner by a Roman, whether man or woman, were foreigners, inheriting the condition of the inferior parent; they were accounted spurious, they were called *hybridæ*, or mongrels, and their condition was little better than that of slaves[m]. They who were not Roman citizens could not ob-

[l] Brisson de Jure Connub. Rom. Antiq. p. 462.

[m] Seneca, Ben. iv. 35. Adam's

tain the right of marriage without first obtaining the freedom of the city: even the Latins could not intermarry with the Romans upon any other condition; and it is recorded as an especial favour which was granted to the Campanians, that, after they had obtained the freedom of the city, and were comprehended in the roll and muster of the censors, they solicited and obtained permission to marry Roman women, or to retain the wives whom they had previously married, with a recognition of the legitimacy of the children who had been born to them[n]. Antony excited the greatest odium at Rome by his marriage with Cleopatra, against the laws and customs of the country[o]; and the people were so indignant at the marriage of Titus with Berenice of Egypt, that he was constrained to divorce her[p]. But when, by the decree of Antoninus, all the people of the Roman empire were declared to be citizens, marriage with barbarians only was interdicted; and even this restriction eventually wore off before the time of Prudentius, when foreigners were admitted to the rights of marriage[q].

[n] Liv. Hist. l. xxxvii.

[o] "Yet I much question, for I cannot stay to enquire, whether the triumvir ever dared to celebrate his marriage either with Roman or Egyptian rites." Gibbon, Rom. Emp. c. liii. n. 59.

[p] Invitus invitam dimisit. Suet. in Tito. "To dismiss with reluctance the reluctant Berenice." Gibbon.

[q] Brisson de Jure Con. Fr. Hotman de Rit. Nupt. et Matr. c. 2. Prudentius contra Symmachum, l. ii.

nunc per genialia fulcra
Externi ad jus connubii; nam sanguine misto
Texitur alternis ex gentibus una propago.

Difference of state, quality, or condition, constituted a third restriction upon Roman marriages.

Children were not permitted to marry without consent of their fathers. This restriction has recently formed the subject of a practical question, and its details are therefore reserved for separate discussion.

By the law of the Twelve Tables "the distinction of Patrician and Plebeian was so great that persons of these different orders were not permitted to intermarry;" and the reason assigned for this prohibition was, "lest the sexes, from passion, forgetting the distinction of ranks, should in this manner unite their families together[r];" and especially lest from the ambiguity of their progeny the right of taking the auspices, which had been hitherto appropriated to the patricians, should be disturbed and claimed by those who were not properly of Patrician rank, and who could not claim to be the heirs of a noble parentage[s]. It was not long before this partial law was repealed and superseded, at the instance of Quintus Canuleius, who proposed to legalize the marriages of Patricians with Plebeians. The fathers were offended at the proposition, alleging, that their blood was contaminated, and the rights of families confounded; that an attempt was made to bring forwards the dregs of the people, and to effect the confusion of public and private auspices; that there would no more be any thing pure and uncorrupt; that all distinctions would be removed; that no man would any more know himself or his posterity; and

[r] Ferguson's Rom. Rep. c. 2. [s] Brisson de Jure Connub.

that, by the permission of these promiscuous marriages, the intercourse of Patricians and Plebeians would be as unrestrained as that of the beasts of the field. It was justly answered by Canuleius, that the people asked no law of marriage which was not already given to neighbouring and to foreign states; that their conquered enemies possessed the right of the city, which was more than the right of marriage; that the law was but a recent innovation of the decemvirs, carried by the worst precedent, and with the highest injury to the people, who could suffer no greater reproach than to be rejected, as contaminated and unworthy of marriage; that the nobility, which the law sought to preserve, was itself of foreign extraction, or of royal gift, or of popular election; and might be sustained by a private resolution, not to marry, and not to suffer their daughters or sisters to marry, into Plebeian families, without the insult and contumely of a public law, by which the society of the city was divided and distracted. There would be equal justice in interdicting the Patricians and Plebeians from the use of the same neighbourhood, the same entertainments, the same road and forum. They asked but the right of citizens, nor could their petition be rejected without meditated insult and indignity, nor could the union of the city be revived, unless the right of marriage was restored, and the people were again permitted to coalesce, to be joined and consolidated in the familiar union of domestic life[t].

The laws which were passed by the management

[t] Liv. Hist. l. iv. s. 1—6.

of Augustus, under the titles of the Julian law *de maritandis ordinibus*, and of the Papian and Poppean laws, comprised many prohibitions of marriage, which as they directly militated against the emperor's design of encouraging marriage, and restoring the population of the city, can only be supposed to have been so deeply incorporated in the prevailing laws, customs, and principles of the age, that even the last necessity of the state, and the will of the sovereign, could not remove them.

The principal provision of the Julian law was, that senators and the sons and daughters of senators should not marry the sons and daughters of freedmen, nor any persons, who, themselves or whose parents, had used the art of a player. The law included the children of senators by adoption, as well as by birth; the latter interminably, the former until the time of their emancipation: it included also their grandchildren, who were not permitted to marry into the family of the freedmen, with the exception probably of the *liberti aureis annulis*. The alleged principle of this law was, that the dignity of the highest rank should not be compromised by matrimonial connexions with an inferior rank; and the effects of violating the law, and indeed of invalid marriages in general, were, 1. that there could be no dowry, for dowry implies the validity of the marriage, but the dowry was not forfeited to the treasury, which was peculiar to incestuous marriages; 2. that the daughter of a freedman, who should impose herself for an ingenuous woman on one of senatorian family, would be liable to an action; 3. that the children born of such marriages

would not be legitimate; 4. that the action *rerum amotarum* could not be brought by persons thus united; 5. that no action for adultery could be brought, as by the husband against the wife; 6. that the presents which they should make to each other would be forfeited to the treasury. There were nevertheless exceptions to this law. If a man of senatorian rank should marry a woman of libertine condition, she would not be his wife while he retained his dignity, but she would nevertheless be in a condition to become his wife, if he should lose it. With the permission of the emperor, a senator might lawfully marry a woman of libertine family; and Augustus, when "objections were made to women of high condition, permitted the nobles to marry emancipated slaves[u]." It was an old question, whether the marriage of a man with a woman of libertine family was vitiated by his elevation to the senatorian rank, which was the opinion of the ancient lawyers, but most justly superseded by Justinian. If the daughter of a senator should be married to a freedman, her marriage would not be disturbed by her father's degradation from the senatorian rank. If a senator's daughter should degrade herself by acting, or by prostitution, or should be publicly condemned, she would be free to marry into a freedman's family; and the widow of a senator, who was not herself born of senatorian family, might marry a freedman, because the prohibition extended only to the children and descendants of senators[x].

[u] Ferguson's Rom. Rep. c. xxxviii. [x] Brisson de Jure Connubii.

These restrictions were confined to persons of senatorian rank, with the exception of whom the Papian law permitted other ingenuous persons to marry the daughters of freedmen, and affirmed the legitimacy of their issue. Even to these however it prohibited the marriage of the actress, the bawd, the prostitute, and the adulteress, and the woman who had been condemned upon public trial. It was indeed a general rule, that between persons of free and persons of servile condition there could be no valid marriage. If a free woman should marry a slave, the marriage would be null, and the issue would be slaves: and if the woman should persist in the marriage, after three proclamations by the master of the slave, she was herself liable to be sold for a slave[y]. If a slave should marry a freeman, the dower could not become the property of the husband, but by right of possession for the prescribed period: but if she should obtain her liberty, while she was living with her husband, the marriage would be confirmed, and the dower might be reclaimed on the dissolution of the marriage. Slaves attached to the soil could not marry with free women, even with consent of their masters: their children would however be free. Free men on the contrary might marry with slaves attached to the soil, but their children would inherit the condition of their mother[z]. These are some of the subtle distinctions of the Roman law.

The Julian law rescinded the oath imposed on freedmen and freedwomen, that they should not

[y] See Tertull. ad Ux. l. ii. s. 8. [z] Fr. Hotman de Rit. Nu. et Matr. c. 2.

marry, provided that they were disposed to contract marriage lawfully. At the same time, it restricted the freedwoman who should be married to her patron from marrying to any other without his consent, so long as he was willing to consider her as his wife, and acted towards her in the capacity of a wife[a].

Thus the Roman law, in respect of difference of condition, interdicted the marriage of persons of free with persons of servile condition: it restricted the senatorial rank from marrying with the libertine rank; and it prohibited in all cases the marriage of persons of ingenuous condition with persons of licentious character and occupation.

The possession of certain offices formed a fourth impediment, or restriction, upon marriage.

Marriage with the Vestal virgins was pronounced incestuous and nefarious; and it is one of the characteristic anecdotes of Heliogabalus, that he committed incest in most impiously defiling a virgin who was consecrated to Vesta[b].

Persons holding any office in the provinces were forbidden to marry the barbarian women, the women that were either born or resident in the provinces, under the apprehension that they might abuse their power, and rather force than conciliate these marriages, which were therefore pronounced to be null, and liable to all the penalties of nullity. These provisions of the old law were extended by the later emperors to the children, relations, companions, counsellors, and domestics, of the provincial officers,

[a] Brisson de Jure Con. [b] Xiphilin. apud Brisson.

who were condemned to the loss of the *arrhæ sponsalitiæ*, with this singular distinction, that if the marriage had been completed contrary to law, the woman was entitled to keep them; but if espousals only had been contracted, as these were not unlawful, she was bound to return them, unless she should afterwards assent to the marriage. The provincial officer was also at liberty to marry a provincial woman, to whom he had been espoused before he proceeded to the province: and if he should marry a provincial woman during his administration, and at the expiration of his office both should assent to confirm the marriage, the marriage would then become lawful, and the issue legitimate. The provincial officers might also consent to the marriage of their daughters, but not to the marriage of their sons, with provincials; and the reasons assigned for this distinction are, the danger of delaying a daughter's marriage, and the greater interest which a father may be supposed to take in the marriage of his son[c].

A decree of the senate, in the time of Antoninus and Commodus, prohibited guardians from marrying their wards, and giving them in marriage to their sons. The pretence for this prohibition was, that guardians, under cover of marriage, might evade a just account of their guardianship, and therefore the law only extended until the woman should attain her twenty-fifth year, when she had the power of demanding the account. Until the woman attained this age the interdict was extended to all persons of whom the account might in any wise be demanded.

[c] Brisson de Jure Con. Fr. Hotman. de Sponsal. c. 2.

The law did not however extend to a daughter of the ward, or restrain the guardian from marrying his daughter to a male ward: and the guardian was himself at liberty to marry a ward to whom he had been betrothed, or destined by her father's will; or who was more than twenty-five years of age, or whose account had been rendered: and if he was already married to her, or had been appointed guardian without his privity, the law did not supersede the marriage. In all other cases, the consequences of violating this law were, besides the other penalties of forbidden marriage, infamy, fine, imprisonment, and banishment[d].

The Roman law, contemplating their natural incapacity of consent, did not admit the marriage of persons that were mad at the time of their marriage: it authorized the marriage of persons that were deaf or dumb[e].

In respect of consanguinity and affinity including adoption the Roman law was more simple, and conformable with the primeval rule.

It restricted every kind of polygamy. It was never lawful at Rome to have more than one wife, and a sentence of infamy was pronounced on the offender who should enter even into a second espousals. The tribune Cæcina indeed, at the instigation of Cæsar, prepared a law that the Romans should be permitted to multiply wives at their pleasure, but the law was never brought forward; and it is one of the many vices imputed to Antony, that

[d] Brisson de Jure Con. Fr. Hotman de Rit. Nu. et Matr. c. 3.
[e] Brisson. de Jure Con.

he was the first Roman who had two wives. His bad example was followed by the Emperor Valentinian, who, to cover his own offence, proposed a law giving the same liberty to others, but the law was not accepted. The infamy of the proposed licence was recognized in the decrees of Valerian and Gallienus, and of Diocletian and Maximianus, and was only superseded by the capital penalty enacted in the Constitutions of Constantine[f].

It was part of the ancient law of Rome, even from the time of Numa, that a woman should not marry within ten months of her husband's decease; and when, for the purpose of consolidating the union between Antony and Octavius, it was proposed, that Antony should marry Octavia, the sister of Octavius, and the widow of Marcellus then recently deceased, the marriage, in itself unlawful, was only sanctioned by an especial decree of the senate. Ten months constituted the ancient year of Romulus, and the Emperors Gratian, Valerian, and Theodosius, added two months to the time of the widow's mourning, so as to make it again a complete year, within which she was not permitted to marry, without being branded with infamy, and degraded from the honour and privilege of an honourable and noble woman. Caligula, in dedicating the temple of Augustus, gave permission to widows who were not pregnant to marry within the limited period: and it is recorded, that both Heliogabalus and Anastasius married widows shortly after the decease of their husbands. The restriction which was laid

[f] Brisson. de Jure Con.

upon widows was also laid upon women that were divorced. In case of a divorce *bonâ gratiâ*, as it was called, or with mutual consent, the woman was not permitted by the constitution of Anastasius to marry within the year: if she divorced herself without just and sufficient cause, she was not permitted to marry within five years[g].

The severity of the ancient law, in prescribing a certain period of widowhood, prevented the indecency of a widow's marriage while she was pregnant by a former husband. The chief instance of such a marriage is that of Augustus with Livia, the wife of Drusus, who, under the influence of his passion, affected to consult the Pontifices, and they consented to the sovereign's will, with the subtle distinction, that if there was any doubt concerning the father the marriage should be delayed, if there was no doubt delay was unnecessary[h]. Augustus therefore married Livia, who within three months became the mother of Claudius Drusus Nero, whose birth was celebrated with sarcastic raillery on the peculiar happiness of the emperor[i]. Similar marriages are imputed to Hortensius with Martia, the wife of Cato Uticensis[k], and to Caligula with Mi-

[g] Brisson. de Jure Con.

[h] Tac. Ann. l. i. s. 10. Dio xlviii. apud Brotier.

[i] Τοις συτυχουσι και τριμηνιω παιδια.

[k] Plut. in Cato. Uticens. Such marriages resembled the practice not uncommon among the Greeks and Romans of lending a wife: a practice which calls forth the just indignation of Tertullian, Apologet. s. 39, where he eloquently contrasts the purity and reserve of the Christian marriages with the licentious indifference of the Roman and the Grecian marriages.

lonia Cæsonia, with whom he had previously committed adultery[l].

These restrictions upon polygamy were designed to ascertain the legitimacy of the issue, and to uphold the reverence which is due from the wife to the husband, and from the husband to the wife. In respect of consanguinity, affinity, and even of adoption, there could be none but invalid and incestuous marriages in the right line of relations, whether ascending or descending. It was incestuous by the law of nations; it was a violation of the law of nature, divinely written and engraven on the heart; it had been a corruption of common humanity to sanction marriage between any who occupied the relation of parents and children, between the father and the daughter, the mother and the son, the grandfather and the granddaughter, the grandmother and the grandson. This was the Roman law, to which none objected, but such as the Romans accounted barbarous. The same provision was justly extended to the issue of unlawful and servile marriages; and it was rightly judged to be contrary to natural law and modesty, that a father should, under any circumstances, marry his daughter[m]. The violation of these restrictions was, under the ancient law of Rome, a capital offence, to be punished by the Pontifices[n].

Neither did the Roman law give validity to marriages between persons related by affinity. It was not lawful to marry a father's wife, nor a grand-

[l] Brisson de Ju. Con. Fr. Hotman de Rit. Nu. et Matr. c. 5.
[m] Ibid. [n] Beza de Divortiis.

father's wife, nor a wife's mother, grandmother, or great grandmother. In language of indignation, nearly resembling that of the apostle, Cicero inveighs against a woman who had married her son-in-law, without auspices, without authority, with omens unpropitious. Oh! the incredible wickedness of the woman, wickedness unheard of but in this single instance! Oh! the unbridled and unrestrained passion! Oh! the extraordinary boldness! The Emperor Antoninus Caracalla is the only recorded example of this inauspicious marriage, in which he made his will the law, and gave the sanction to a practice which his authority should have restrained, marrying his mother and adding incest to parricide. Nor might the son's wife or the grandson's wife marry the father or grandfather of her husband. Both of these marriages, of the mother-in-law with her son-in-law and of the daughter-in-law with her father-in-law, were confessedly incestuous, and contrary to modesty, chastity, natural delicacy, and reserve, and to public honour[o].

The Roman law still further restricted the marriage of a father with a woman betrothed to his son, and of a son with a woman betrothed to his father; although they were not married, and therefore not properly in the relation of daughter-in-law and mother-in-law. The decree of the Emperor Alexander also interdicted the marriage of children with the concubines of their fathers[p].

Persons related by adoption, in the degrees of parent and child, were not permitted to marry even

[o] Brisson. de Jure Con. [p] Ibid.

after the emancipation of the adopted party, which might otherwise have been effected for the purpose[q].

In respect of the collateral or transverse line of relation the Roman law was very scrupulous, and strictly prohibited the marriage of brothers and sisters, whether they were born of the same father and mother, or only of the same father or the same mother[r]. Cornelius Nepos, in recording the marriage of Cimon with his sister, observes, that such marriages were not permitted by the Roman laws, and in truth the just provisions of these laws were never violated but by such monsters as Caligula and Otho. In the earlier and severer ages of the republic, when one Papyrius had debauched his sister, the father sent a sword to his daughter, with which she destroyed herself, and the son also expiated his crime by suicide. In collateral relations adoption was not an impediment to marriage. When the adoption was dissolved, a man might marry a woman who was his sister by adoption: he might also marry the mother, aunt, or granddaughter, of his adopting father; but not his wife, because there had been between them the relation of son-in-law and mother-in-law: without emancipation he might also marry the daughter of his sister by adoption, and, under certain limitations, the daughter of his own father by adoption. Thus Maximinus gave his daughter in marriage to Constantine, who was his grandson by adoption[s]: so Claudius gave his daughter Octavia to Nero, who was his adopted son, previously trans-

[q] Fr. Hotman de Rit. Nu. et Matr. c. 4.
[r] Ibid. c. 5.
[s] Ibid. c. 4.

ferring his daughter into another family by adoption, that it might not be said that the brother had married the sister[t].

The marriage of an uncle with a niece was also interdicted by the Roman law, and unknown before the reign of Claudius, whose passion for Agrippina, the daughter of his brother Germanicus, led him to procure a decree of the senate to justify the marriage of uncles with their brothers' daughters[u], which before that time had been held unjust, and to which there was afterwards such a natural repugnance that they were celebrated in very few instances, although the law and licence remained until it was repealed by Nerva. Constans and Constantius annexed a capital punishment to the offence, and their constitution was confirmed by Zeno[x]. It was not permitted to have a brother's daughter for a concubine, although she was the daughter of a freedman, without the imputation of incest: but Domitian was not ashamed to live in open debauchery with Julia his niece, and the pernicious precedent was followed by Heraclius[y].

The will of Claudius was the occasion of introducing a singular distinction into the Roman law, which now permitted the marriage of an uncle with his brother's daughter, but still restricted the marriage of an uncle with his sister's daughter, to whom

[t] Brisson de Jure Con.

[u] See Tac. Ann. l. xii. s. 5, 6. Beza, de Divortiis, considers this restriction one of the laws, ab ipsa natura parente, vel ab ipso Deo potius cordibus humanis insculptæ..

[x] Fr. Hotman de Rit. Nu. et Matr. c. 5.

[y] Brisson de Jure Con.

he bore the very same relation, marriage with whom was pronounced incestuous by the civil law, and called not marriage but *contubernium*, and expressly interdicted by the decrees of the Emperors Maximilian and Diocletian[z].

If uncles were not permitted to marry their nieces, it seems to follow by analogy that nephews should not marry their aunts; and the incestuous nature of these marriages may be further inferred from the plea of Nero, in imputing to Silvanus the crime of incest, committed with Lepida his aunt, the wife of Cassius. These marriages were expressly prohibited in the Roman laws, on the ground that aunts participated in the parental relation.

The marriage of cousins can hardly be said to have been regulated by Roman law, and was never prohibited. Livy has preserved the speech of one Ligustinus, who had been married to his cousin, the daughter of his father's brother: and similar marriages were contracted by Brutus with the daughter of his uncle Cato; by Melinus with his cousin, the sister of Cluentius; and by Antoninus with Annia Faustina. Quintilian also, in deploring the premature death of his son, declares, that it had been his intention to give him in marriage to his cousin, the daughter of his father's brother. Tacitus however, or rather Vitellius, whose artful speech he is recording, affirms, that these marriages were for a long time unknown at Rome; and Plutarch relates, that it was only by a late constitution that they were allowed, when a man charged with the offence of

[z] Fr. Hotman de Rit. Nu. et Matr. c. 5.

marrying his cousin was acquitted by the people, who passed a law on the occasion, giving sanction to the marriage of cousins, but forbidding the marriage of nearer relations. The infrequency of these marriages before the time of Plutarch and Tacitus, depended more upon the private will and opinion of individuals than upon the provisions of any public law. After this time these marriages became more frequent; and indeed the whole law of marriage was revised under the Christian emperors.

"The profane legislators of Rome," says Gibbon, "were never tempted, by interest or superstition, to multiply the forbidden degrees: but they inflexibly condemned the marriage of brothers and sisters; hesitated whether first-cousins should be touched by the same interdict; revered the parental character of aunts and uncles; and treated affinity and adoption as a just imitation of the ties of blood[a]." They were also resolute in the interdiction of all polygamy, and in insisting on the nullity of all marriages between persons of inadequate age; persons who were not citizens of Rome; who were of different ranks; or who held certain offices, whether public or private, which they might be under temptation to abuse. The general penalty of these unjust marriages, with variations adapted to particular circumstances, was the illegitimacy and consequent disinheritance of the children, and the forfeiture of all conjugal privileges, whether for the redress of injuries or the establishment of lawful rights. In many of these restrictions upon matrimony, there is

[a] Rom. Emp. c. 44.

a striking conformity in the institution of the two great nations of antiquity.

The general prevalence of these restrictions, and the general abhorrence of the incest which they are intended to prevent, have been ascribed to a law of nature and an innate sense of propriety; and the supposition is rather confirmed than weakened by the exceptions which are alleged. The incestuous marriage of parents with children was contrary to the ancient[b] law of Persia as well as of Greece: and it was only in the corruption of Persian manners, and under the pretence of preserving the purity of the royal blood, that these marriages were at first admitted, and eventually obtained such sanction and authority, that none but the issue of a mother by her son was worthy of the Magian priesthood[c]. It is especially recorded, that the passion of Cambyses for his own sister introduced the marriage of brothers with sisters, which had been previously unknown; and when the king consulted the judges upon the question, it was subtly resolved, that there was no law which forbade the marriage, and that there was a law which suffered kings to do as they would[d]. The prevalence of these incestuous marriages in succeeding ages was a subject, to which the primitive writers[e] frequently advert, in exposing the evils of the popular idolatry.

It is not necessary to dwell on the perverted

[b] Gerhard, s. 302. [c] Catullus in Gell.

[d] Gerhard, s. 303. Herodot. Thalia. Cyrus is said to have married his mother's sister. See Cyropæd. l. viii. c. 5. s. 28.

[e] Tertull. Apologet. s. 9. Min. Felix, s. 31. Recog. S. Clem. l. ix. c. 20, 27, 29. Orac. Sibyll. p. 660. ed. Amst. 1689.

philosophy or the rude barbarism, which authorized unnatural passion and polygamy, and permitted a community of wives[f]. These excesses also provoked the just reprehension of the primitive writers. The same incestuous commerce with which the Persians were stigmatized, prevailed very generally in the East, and especially among the Magusæi, Medians, Galatians, Phrygians, and Egyptians. It is not improbable that the Phœnicians used some reserve in favour of the uterine sister, to which Abraham may have alluded when he called Sarah the daughter of his father, and which he may have intended to contrast with the common practice of the Egyptians, who married their sisters without any discrimination, even if they were born of the same father and mother, or the same father, or the same mother, or whether they were twins. The Canaanites were guilty of transgressing all the parts

[f] Lactantius, Div. Inst. l. iii. c. 22. Cf. l. iv. c. 3. exposes Plato's doctrine of the community of wives. Cæsar, de Bell. Gall. l. v. s. 14. has recorded the practice of the ancient Britons. In the Himala mountains there prevails a community of husbands; and it is not unusual for four or five brothers to marry and possess the same woman at the same time. On the coast of Malabar a woman is *not allowed* to have more than twelve husbands: in the neighbourhood of Calicut a woman is permitted by the laws to have several husbands: the practice is especially prevalent among the noble castes, and some of these ladies have had ten of these husbands at the same time. In the ancient Median empire also it was customary for women to entertain a number of husbands. See Monthly Review, vol. 95. p. 234. Among the Omawhaws, a North American tribe, numbers of the females are betrothed in infancy, and the individual who marries the eldest daughter espouses all the sisters as they come of age. Ibid. vol. 101. p. 347.

of the law of the Noachidæ, especially the original prohibition of incestuous marriage; for in respect of marriage within the degrees prohibited by the Levitical law, no guilt could be incurred before the publication of that law[g]. These offences of the Canaanites were called abominations and abominable customs, and as many other provisions of the Levitical law were principally or entirely remedial, and introduced for the counteraction of abuses which prevailed among the heathen, so the Levitical prohibitions were especially designed to obviate the abominations of marriage, which were usual at the time among the Canaanites and the Egyptians.

The law was introduced with a manifest allusion to these practices: "Speak unto the children of Israel, and say unto them, I am the Lord your God. After the doings of the land of Egypt, wherein ye dwelt, shall ye not do: and after the doings of the land of Canaan shall ye not do; neither shall ye walk in their ordinances[h]." After prohibiting access generally to any who is near of kin, the divine Legislator proceeds to specify different persons, with whom there should be no intermarriage. Fifteen persons are expressly mentioned in Leviticus and Deuteronomy, besides the wife of another man whom the Israelites were forbidden to marry, of whom they were related to six by consanguinity, and nine by affinity[i].

[g] Selden de Jure Nat. et Gen. l. v. c. 11.

[h] Lev. xviii. 2, 3.

[i] Nata, *soror*, *neptis*, matertera, patris et uxor
Et patrui conjux, mater privigna, noverca,

By Consanguinity.	*By Affinity.*
1. Mother.	1. Father's wife.
2. Sister, whether the daughter of father or mother, or of both.	2. Father's brother's wife.
3. Son's daughter.	3. Son's wife.
4. Daughter's daughter.	4. Brother's wife.
5. Father's sister.	5. Wife's son's daughter.
6. Mother's sister.	6. Wife's daughter's daughter.
	7. Wife's sister.
	8. Wife's mother.
	9. Wife's daughter.

To these are added, as it is said, by necessary inference, three other persons: viz. 1. daughter; 2. wife's father's mother; 3. wife's mother's mother. The daughter is added by inference; for if the daughter's daughter is interdicted, much more the daughter herself: and indeed the prohibition is expressed in the interdiction of commerce with a woman and her daughter. It is from this latter prohibition, by a less obvious inference, that the wife's grandmother on either side is interdicted. It will be observed, that in this table of prohibitions, the extreme points are, the grandmother on one side and the granddaughter on the other.

The force of the prohibitions which are specified was reciprocal, and what is expressed of the one sex is implied of the other. Thus, if the son is for-

Uxorisque soror, privigni nata, nurusque
Atque soror patris, conjungi lege vetantur.

The *neptis* and the *soror* must be understood each of two relations, because the nata is added: Gerhard, s. 260. makes the number of persons sixteen, taking the sister twice as born ex utroque vel ex altero tantum parente.

bidden to marry the mother, the mother is by the same rule forbidden to marry the son; and if a woman is forbidden to marry a son, a man is forbidden to marry a daughter[k].

From the unity of the man and wife in marriage, it is held to be a general rule in cases of affinity, that a man is interdicted from marrying his wife's relations, as his own in the same degree. Philo held that the law was so severe, as to prohibit the son-in-law, even after his father's death, from marrying his mother-in-law; partly from the reverence which was due to the father, and partly from the maternal relation which had been held by the mother-in-law: nor did it allow a man to marry his daughter-in-law, whether in her widowhood or virginity, either during the life or after the decease of his wife, her mother. For the father-in-law, holding the paternal relation, was bound to respect his daughter-in-law as his own daughter[l].

According to the exposition of Jewish commentators, the mother, step-mother, daughter-in-law, father's own brother's wife, and the brother's wife, except in a particular case, whether legitimately or illegitimately born, are interdicted: the aunt also and the wife's daughter are properly interdicted, if there is any relation by blood. The wife's relations might not be married during her life, or after her decease or divorce, with the only exception of the wife's sister, upon whom the restriction was limited to the life of the existing wife. In the interdiction upon the

[k] Fr. Hotman de Rit. Nupt. et Matr. c. 7. Gerhard, s. 261, 275.

[l] Fr. Hotman de Rit. Nupt. et Matr. c. 8.

wife's relations, the law took no notice of any intercourse before the marriage; but the tradition of the elders supplied the deficiency, and pronounced it unlawful for a man to marry, during the woman's life, the relations of any woman with whom he had lived in adultery or prostitution, not so unlawful, however, as to vitiate the marriage, but only to render the offender worthy of corporal punishment: and the sentence was not unwisely designed, to cut off all temptation to a renewal of the intercourse, which after the marriage would be incestuous. It should be remembered, that the notion of incest among the Jews was confined to marriage, and that no incest would be imputed to any meretricious intercourse which a man might hold with two sisters, or even with a mother and a daughter, or even to a marriage with a woman whom his father had debauched. There was also no incest in marrying the mother or daughter of a father's wife; or a brother's son's wife; or a niece, whether born of a brother or a sister. The reasons assigned by the Jews for the prohibition of incestuous marriage, were, the danger arising in the familiar intercourse of domestic life, and the impropriety of uniting the branch with the root[m].

The Talmudists however were not content without an almost indefinite extension of the restrictions of the sacred law, and under the pretence of precluding the violations of that law, and under the name of secondary wives, they expressly interdicted the marriage of twenty other relations, and by consequence

[m] Selden de Jure Nat. et Gent. l. v. c. 10.

of many more; viz. 1, 2. The grandmother, on the father's and the mother's side, and all their mothers in ascent before them; 3, 4. the mothers of the paternal and maternal grandfathers; 5. the wife of the paternal grandfather, and all ancestors in perperpetual ascent, so that no Hebrew could marry the wife of the patriarch Jacob; 6. the wife of the maternal grandfather; 7. the wife of the father's brother by the same mother; 8. the wife of the mother's brother; 9. the son's daughter-in-law, and all descended from her; 10. the daughter's daughter-in-law; 11, 12, 13, 14, 15, 16. the granddaughters by a son's or daughter's son, or daughter, or son or daughter-in-law; 17, 18, 19, 20. the two grandmothers of the father-in-law, and the two grandmothers of the mother-in-law[n].

The Karaites adopted a different rule, and interpreting the general interdiction of any that is near of kin as a root or principle from which the prohibitory law of incest is to be collected, and considering the specified instances rather as examples than comprising the whole body of the law, they proceeded to form a complicated law of prohibitions of incest. From the alleged unity of the man and the wife they inferred, that the kindred of the husband are the kindred of the wife, and therefore if a woman should be divorced by three husbands in succession, and married to a fourth, they interdicted the marriage of any of these husbands with the kindred of any of the other husbands, restricting however the notion of kindred to the six principal relations, of

[n] Ux. Ebr. l. i. c. 2.

father and mother, brother and sister, son and daughter. Thus they restricted the husband of Sarah from marrying the mother-in-law, the mother, the wife of a brother, the sister, the daughter, and the daughter-in-law, of any second, third, or fourth husband, whom Sarah might have after her divorce from her husband[o].

The modern Karaites, rejecting the arbitrary inference from the conjugal unity, but still interpreting the interdiction of kindred as a genus of the widest sense, introduced under five principal rules a copious code of matrimonial restrictions, which they derived by remote inference from the Levitical law, prohibiting a man to marry, 1. his kindred; 2. the kindred of his kin; 3. two persons akin to each other, as a mother and daughter; 4. the kindred of a wife's kindred, as her brother's daughter; 5. two persons that are akin may not marry two others that are akin, as a father and a son may not marry a woman and her daughter[p].

To these five rules has been added a sixth, yet more complex, interdicting the marriage of two kinsmen with any person, and the kin of the kin of that person. Thus a mother and daughter being akin to each other may not marry Reuben and Reuben's son's son[q].

Although these rules were generally received, they were not received without exception; and an exception was especially made to the extension of the impediment from the wife to the husband, and a new system was exhibited in five rules, in which

[o] Ux. Ebr. l. i. c. 3. [p] Ibid. c. 4. [q] Ibid. c. 5.

both sexes are distinctly specified. 1. a man may not marry his own kin, mother, sister, daughter; nor a woman her kin, father, son, brother: 2. a man may not marry the kin of his kin, grandmother, aunt, granddaughter, niece; nor a woman in the same manner: 3. a man may not marry two relations, as mother and daughter; nor a woman, father and son: 4. a man may not marry a woman and the kin of the kin of that woman, as Mary, and her grandmother, or aunt, or niece, &c. 5. two relations may not marry two persons related collaterally or by descent, as John and John's son may not marry Mary and Mary's daughter or sister. In case of descent the rule is to be observed without any limitation from generation to generation.

These different opinions, which are detailed at considerable length by Selden, were fiercely debated between the Talmudists and the Karaites, and the contention was increased by the penal consequences which each imputed to the violation of the prohibitory law which he maintained, viz. excision, with exclusion from the right of entering the congregation of the Lord[r]. Other and more severe penalties were originally annexed to the violation of the Levitical prohibitions[s]. Incest with the mother-in-law or daughter-in-law was to be punished in both parties with death, as it is interpreted, by stoning. If a man married a woman and her mother, the several parties, if they consented to the offence, were condemned to be burned. If a man married his sister, both parties were to be put to death, publicly and

[r] Ux. Ebr. l. i. c. 6. [s] Levit. xx. Ainsworth in loc.

in the presence of the congregation. If a nephew married an aunt, both were to bear their iniquity. The penalty of marrying an uncle's or a brother's wife was, that the parties should be childless, that they should have no issue; or that they should be grieved by the untimely death of their children; or that the children should be reckoned illegitimate, and incapable of succeeding to the inheritance of their father[t]. In all violations of the Levitical prohibitions, where the offence was not followed by immediate and capital punishment, it was a received rule, that no marriage could be contracted, or that, if it was contracted, it was utterly void and of no effect[u].

While the Jews restricted the notion of incest to marriage, they extended it beyond the prohibited cases which depended on consanguinity and affinity; and marriage with the heathen generally, and with the seven nations of Canaan in particular, was expressly forbidden and reputed incestuous; and the issue of these marriages has been demonstratively shewn to be the *bastard*, who should not enter into the congregation of the Lord[x]. Marriage out of the chosen people was always criminal; it was an offence before the flood; it was avoided, discountenanced, and condemned, in the patriarchal age; it was expressly forbidden in the law of Moses; the history of Solomon exhibits the effects of its violation; the marriage of the strange wives, during the

[t] Gerhard, s. 269. [u] Ux. Ebr. l. i. c. 12. [x] Deut. xxiii. 2. Spencer de Leg. Hebr. l. i. c. 6. s. 3.

captivity at Babylon, was, in the judgment of their great reformers[y], a sin which the people could not expiate without divorcing them: and it was a state which was scrupulously avoided by the piety of Tobit. Such marriages were forbidden; they were punished by the separation of the issue from the congregation of the Lord; and were in themselves null and liable to be dissolved. The rule was however strictly confined to native Jews: proselytes from among the Gentiles were permitted to marry proselytes of their own or any other nation, without any discrimination upon the account of birth, of which the condition was destroyed upon their regeneration and admission into the Jewish covenant, so that they might marry even their nearest relations without any imputation of incest, even although they were admitted together into Judaism, and although they were children of the same parents, but born the one before and the other after regeneration. From the offence which this promiscuous

[y] Ezra x.3. "That which was done contrary to the law of God was looked upon as null, and therefore these were accounted no marriages, and their children were no better than those we call bastards, and were not to be a part of the family, but to be put away with their mothers . . . it was unlawful to marry with the children of these women, for they were reputed unclean, though their fathers were Israelites. Thus Maimonides reports the sense of the law to be; A son begot of a Gentile by an Israelite is not to be accounted for a son. If a son indeed were begot by a Gentile of an Israelitish woman the child was an Israelite for *partus sequitur ventrem.*" Patrick in loc. See also Leslie and Dodwell on Marriages in different Communions; where the case of marriages with the heathen, or out of the peculium, is discussed at length.

intercourse gave to the Gentiles[z], it was abridged, and, to prevent the exceptions of the proselyte, the provisions of the law of the Noachidæ were enforced, and marriage with a mother or an uterine sister was forbidden to be contracted, and dissolved if it was contracted. Any other marriage, however forbidden by the Levitical law, was approved and confirmed; as was marriage, subsequent to the regeneration, with persons related on the father's side, even with two sisters, the daughters of a common father; while the marriage with those on the mother's side was disallowed, as with a mother's daughter and a mother's sister, and also with the wife of the uterine brother, if that brother was a proselyte. If a man had married two uterine sisters, or a mother and a daughter, he was required to divorce the one, but if he survived his wife, and she was a proselyte, he was free to marry her mother or daughter[a].

The law of consanguinity was not without other exceptions among the native Jews. If a man died without children his brother or brothers in succession were required to marry her, and if they rejected her, the right and obligation devolved upon the next of kin[b]. The heiress also was required to marry one of the family of the tribe of her father, that there might be no disturbance of the inheritance originally appropriated to the several tribes[c].

A just and reasonable impediment to marriage was founded in certain imperfections and impurities,

[z] Tacitus, Hist. l. v. s. 5. alludes to the practice of the proselytes, and to the refusal of marriages with the heathen.

[a] Selden de Jure Nat. et Gen. l. v. c. 18. [b] Deut. xxv. 5. [c] Numb. xxxvi. 6, 7.

which are specified in the Law[d]; and it was a humane and moral provision which prohibited a man from marrying a second time the woman whom he had once divorced[e].

If the Levitical law contained no express prohibition of polygamy, it cannot be charged with giving any licence or encouragement to the prevailing practice, which was in immediate opposition to the record of the divine institution of marriage. The conduct of the patriarchs has been usually vindicated[f] upon the necessity of multiplying the human race, and upon the strong desire of giving birth to the promised Messiah; but the patriarchal example, instead of being used as a precedent, might have been powerfully counteracted by the restrictions which were laid upon the assumed licence of divorce, and by the judgments which the prophet pronounced upon the practice, with reference to the primitive unity of marriage[g]. The great model of Jewish sanctity, the High Priest, was permitted to have but one wife, and required upon his elevation to divorce any other wife: he was also supposed to be exempted from the obligation of marrying the widow of his brother. It was expressly ordained in the law, that he should marry none but a virgin of his own people, and that he should not profane his seed by any matrimonial impurity, which would

[d] Lev. xviii. 19. xx. 19. Deut. xxiii. 1. [e] Deut. xxiv. 4.

[f] Brisson de Jure Con. See also Tertull. de Exhort. Castitat. s. 6. Compare Ad Ux. l. i. s. 2. Cl. Alex. Strom. l. ii. s. 19. l. iii. s. 12.

[g] Malachi ii. 14, 15.

contaminate his offspring, or by any transgression of the general rule of the priesthood, who were restricted from marrying a widow, or a divorced woman, or any that was profane, or a whore, which was interpreted of any woman not of the house of Israel[h]. The plurality even of the king's wives was limited, and they were not allowed to have more than eighteen wives, a limitation as curious as the argument on which it proceeded, that when David was reproached with the gift of his master's wives, it was said, that if they had not been enough, he might have had, as the words may be rendered, so many and so many: but Saul had six wives, and 6+6+6=18. If any of these royal wives were divorced, or left in widowhood, it was not lawful for a subject to marry them[i]. The polygamy of the people was governed by their means of supporting their wives, who were not allowed to exceed the number of four, and even this number might be abridged by local circumstances; nor was it allowed to have different wives in distant residences, because the children might thus be unknown to each other, and involved in incestuous marriages.

The evidence of the New Testament upon the doctrine of incestuous marriages is less copious than important. If the view of our Lord's clause of exception in the law of divorce which is maintained in the Appendix be approved, and his words be interpreted of that peculiar kind of incest which the

[h] Lev. xxi. 7, 13, 14. Ezek. xliv. 22. Tert. Exhort. Castitat. s. 7. Ux. Ebr. l. i. c. 7.

[i] 2 Sam. xii. 8. Ux. Ebr. l. i. c. 8.

Jews imputed to marriage with the heathen, there will be the highest authority for proscribing the marriage of the faithful with the unbelieving, and for declaring such marriages invalid and liable to be dissolved. Such marriages are clearly forbidden in the precepts of the apostle to marry only in the Lord[k], and to be not unequally yoked together with unbelievers[l], and, as is contended in the more difficult text, of making the members of Christ the members of an *alien*[m]; and it is in respect of these marriages that Esau[n] is proposed as an admonitory example to the Christian Church. The word of our Lord may, however, without violence to the context, be also understood of incestuous marriages in general, implied under a term denoting incest generally, or incest of a particular kind.

It was the great offence of the Baptist that he condemned the marriage of Herod with his brother's wife: It is not lawful for thee to have her[o]. Thus the Baptist, who was the great means of connecting the Old and the New Testaments, may be thought to affirm, by the allegation of a specific rule, the continuance and perpetuity of the Levitical restrictions[p].

The case of the incestuous Corinthian confirms the inference by another example: It is commonly reported that there is fornication among you, and such fornication as is not so much as named among

[k] 1 Cor. vii. 39. [l] 2 Cor. vi. 14. [m] 1 Cor. vi. 15. [n] Heb. xii. 16. [o] Matt. xiv. 4. Orig. Com. in Matt. tom. x. s. 22. Homil. in Luc. xxvii. [p] Gerhard. s. 299.

the Gentiles, that one should have his father's wife[q]. Hammond explains the fornication in this text, of sins of uncleanness, and marriage within the prohibited degrees, of that disclosing of nakedness which comprehends all the marriages within the prohibited degrees. It is defined by the context of having a father's wife; not of taking her away, or committing adultery with her, but of having matrimonial possession of her, and being married to her. This crime was such, "*quod vel Gentiles nefandum putant;*" such as the Gentiles deemed impious and unworthy of mention; such as was expressly, and under a capital penalty, forbidden to the Jews; and such that, in the apostle's judgment, the offender was unworthy of the communion of the faithful, and therefore made the first example of excommunication. The allusion of the apostle to the opinion of the Gentiles will go far to justify the prohibition of all marriages not approved among the heathen, and to establish by implication the authority of a strict and comprehensive code of matrimonial purity in the Christian Church. The examples alleged in the New Testament are cases of affinity: the prohibition of marriage within the degrees of consanguinity is of necessity included.

The early writers of the Christian Church take but little notice of these prohibited marriages, except in refuting the pernicious heresies of their contemporaries, by whom the purity of marriage was depraved; or in exposing the incest which was common

[q] 1 Cor. v. 1. Hammond in loc. Cf. Poli Synops. See Appendix, No. I.

among the heathen, and from which both the law and the practice of the Church were free. There appears however to have been a general agreement, that there could be no intermarriage of the faithful with heathens or with Jews. This was a common interpretation of the Apostle's words concerning marrying only in the Lord, and being unequally yoked together with unbelievers. Tertullian[r] appears to give the same sense to the clause of exception in our Lord's prohibition of divorce, as if no marriages were invalid, but such as were contracted with heathens: and Cyprian[s] puts the same interpretation on the Apostle's argument of making the members of Christ the members of an harlot. Tertullian affirms, that the law of the Creator every where takes away the marriage of the Allophyli[t], or persons not in the communion of the faithful; and Cyprian teaches, that marriage is not to be celebrated with the heathen[u]. The expositions and assertions of these distinguished fathers are confirmed by a long succession of decrees of councils. The first council of Arles (A. D. 314.) forbids any Christians to marry Gentiles, under pain of excommunication, as does the council of Eliberis, (A. D. 305.) under pain of excommunication to the parents. The council of Laodicea, (A. D. 361.) and of Agde, (A. D. 506.) prohibit marriage generally with heretics. The third council of Carthage, (A. D. 397.) forbids the marriage of the sons and daughters of the bishops and clergy, with heathens, heretics, and schismatics.

[r] Ad Ux. ii. s. 2. See Appendix, No. I. [s] Lib. Test. iii. s. 62. [t] Adv. Marcion, s. 7. [u] Lib. Test. iii. s. 62.

The council of Chalcedon, (A. D. 451.) forbids the marriage of readers with Jews, Gentiles, or heretics, under pain of canonical censure. The second council of Orleans, (A.D. 533.) forbids the marriage of Jews, pronouncing it unlawful; and if any man upon admonition refuse to dissolve such marriage, he was to be denied all benefit of communion. "Nor was the civil law wanting to confirm the ecclesiastical with its sanction; for by an Edict published by Valentinian and Theodosius, which is twice repeated in the Theodosian code, and stands still as law in the Justinian code, it was ordained; If any Jew presumes to marry a Christian woman, or a Christian takes to wife a Jewish woman, their crime is put into the same class with adultery, that is, made a capital crime; and not only relations, but any one has liberty to accuse and prosecute them upon such transgression. Constantius before this had made it a capital crime for a Jew to marry a Christian woman, but laid no penalty upon the Christian marrying a Jew. But this being thought a defect by Theodosius, he supplied it by that new law, which more expressly made it capital for them both. And so all possible restraint was laid upon such marriages, that the civil power could think of[x]."

When the empire became Christian, although the fathers were more busily employed in promoting celibacy than in devising just laws of matrimony, the emperors zealously concurred with them in revising the laws which regulated matrimony, and in enforcing or enlarging the restrictions which pre-

[x] Bingham's Eccl. Antiq. b. xxii. c. 2. s. 1.

viously prevailed. It was in conformity with the old laws of Rome, that Basil pronounced the marriage of slaves, without consent of masters, and of children, without consent of parents, not marriage but fornication. It was also in conformity with the ancient law, that Constantine, Valentinian, and Marcian, forbade senators, provincial governors, city magistrates, and high priests of provinces, to marry slaves, freedwomen, actresses, innkeepers, or daughters of innkeepers, of pimps, and gladiators, or sellers of small wares, without incurring the penalty of infamy and outlawry, with illegitimacy and disinheritance of the issue; and even the Curialis might not marry a slave, without condemnation of the woman to the mines, and of the man to perpetual banishment, with confiscation of goods. It was a received rule, that the parties should be of equal rank and condition, and that a person of ingenuous rank should not marry with a person of servile state or mean occupation. The laws of Theodosius continued the inhibition of marriage between provincial governors and the women of the provinces, and extended the period of widowhood to a full year. If the wife of an absent husband should marry, without certain information of her husband's death, she was declared by the canons of Basil, repeated by the council in Trullo, to be guilty of adultery; and even the soldier's wife, notwithstanding the privilege granted by the law of Constantine, was by the same canons liable to be claimed by the original husband, and the second marriage would of course be of no effect. Constantine so far mitigated the prohibition of the guardian to marry the ward, as to permit the

former to marry the latter when she should come of age, if he had not defiled her during the minority, of which the penalty would be banishment with confiscation of goods[y].

In respect of marriages more properly incestuous, the imperial laws interdicted and rendered invalid the marriage of more than one wife, the marriage of a widow within a certain period, the marriage of a brother's widow and a wife's sister, and the marriage of uncles and aunts with nephews and nieces: they also interfered with the marriage of cousins.

Polygamy, ever infamous and unlawful at Rome, was made a capital offence by the law of Constantine. It was also expressly forbidden by the emperors Theodosius, Arcadius, and Honorius; and by Justinian, who decreed; No man who is lawfully married may bring in other wives while the former marriage subsists, or have lawful children by them. An opinion appears to have prevailed at one time at Rome, that a husband who fell into captivity fell into a servile condition, and lost his marital rights, so that his wife was at liberty to marry again. Quintilian contended that the marriage could only be dissolved by death or divorce, and that marriage, contracted without certain information of the husband's decease, was no better than adultery. The later emperors fell into this opinion, affirming the continuance of the marriage, and disallowing the woman's right to marry again, unless she obtained a divorce or waited for a period of five years, (with

[y] Bingham's Eccl. Antiq. b. xxii. c. 2. s. 6, 7.

the exception of the soldier's wife, whom Constantine's law permitted to marry again, after she had not heard of her husband for four years,) so that the marriage might have the appearance of being dissolved *bona gratia*, or by mutual consent. The parties would otherwise be liable to the penalties of an unjust divorce; viz. the woman to the forfeiture of the dower, and the man to the loss of gifts before the marriage[z].

The law of Constantine allowed the right of marriage after divorce, only when the woman was an adulteress, a sorcerer, or a pander. It was objected to this licence, that it was contrary to the sense of Scripture[a]; but the objection was not suffered to prevail. Others held a middle opinion, that such marriages were not lawful, and should be prevented by private admonition and reproof; but that as the authority of Scripture might be disputed on the point, they did not call for ecclesiastical censure or excommunication. The law underwent various modifications, but the principal ecclesiastics were generally unfavourable to the licence which it conveyed[b].

As adultery, under the imperial law, was a capital offence, it allowed no question of the marriage of the

[z] Brisson de Jure Con.

[a] 1 Cor. vii. 39. from whence it was justly argued, that the bond of marriage continued during the life of both parties, and was dissolved by the death of either of them. The Monogamists contended that the contract was indissoluble even in death, and therefore objected to any marriage but the first.

[b] Bingham, b. xxii. c. 2. s. 12.

adulterer with the adulteress, which was permitted by the discipline of the Church, after the decease of the unoffending consort[c].

The marriage of a brother's widow was not unlawful in ancient Rome. The impiety imputed to the marriage of Tarquin with the elder Tullia, is founded in the circumstances under which it was celebrated, rather than in the incestuous character of the marriage. The marriage of Marcus Crassus with his brother's widow is pronounced by Plutarch to be irreproachable. Titus indeed upon his death-bed is said to have repented of but one thing, which is supposed to have been his intercourse with the wife of his brother Domitian. The Imperial Constitutions, however, and the Canons of the Council of Neocæsarea, (A. D. 314.) interdicted these marriages; and when certain Egyptians had married the wives of their deceased brothers, under pretence that they were virgins, the emperor Zeno inflicted the penalties of incestuous marriages upon the parties who contracted them, and upon their issue[d].

The emperors Valentinian, Theodosius, and Arcadius, superseded the liberty of marrying the wife's sister, and thus forming an union with two sisters. The emperor Honorius nevertheless married the two daughters of Stilicho in succession; and when neither of them had issue, and both of them were taken away prematurely, it was remarked by Paulus, that they were both cut off by the judgment of God, by

[c] Bingham, b. xxii. c. 2. s. 13. [d] Brisson de Jure Con.

an unexpected death, and departed from this life in their virginity[e].

The marriage of the uncle with the niece and the aunt with the nephew, to which the conduct of some of the emperors had given a certain sanction and authority, was prohibited by the imperial Constitutions, and pronounced incestuous and liable to capital punishment by Constantine and Constans; and when their constitution fell into neglect, the restriction was renewed by Zeno and Anastasius, with the entire concurrence of Ambrose: You are preparing, said that father, to marry your son to your granddaughter: in other words, that your son may marry the daughter of his sister, Is there any occasion of doubt, when the divine law prohibits the marriage of cousins by the father's side, who are related but in the fourth degree; while the marriage of the uncle with the niece is in the third degree, in which the civil law does not permit the union of marriage.

The marriage of cousins, which was left indifferent under the ancient law, received authority from the conduct of Constantius, in giving his sister in marriage to her cousin Julian. Theodosius the elder was the first who restricted the marriage of cousins, on which he imposed the penalty of confiscation and

[e] Brisson de Jure Con. The ecclesiastical laws pronounced such marriages incestuous, and liable to penance from five to fifteen years. If a woman married two brothers, she was to be excommunicated until the day of her death; and then only to be reconciled to the Church upon condition of dissolving the marriage, and submitting to solemn penance if she should recover. Bingham, b. xvi. c. 11. s. 3.

burning; in which he was actuated by the advice of Ambrose, and was supported by Paulus Diaconus. The severity of the penalty was gradually mitigated by Honorius and Arcadius; and the latter eventually revoked the restriction, and legalized the marriage of cousins; making the children legitimate and entitled to inherit. Theodosius the younger also gave an express sanction to these marriages: the opinion of Justinian was uncertain, but was probably favourable to them[f]. The law of Theodosius was in direct opposition to the judgment of Athanasius, and was so little in unison with the spirit of the age, that one of his principal eulogists[g] argued against them with peculiar elegance of sentiment and expression, that in respect of the marriage of cousins, custom had seldom allowed what was permitted by law, what the divine law had not prohibited, and what no human law had before restricted. It had been the religious care of the ancient fathers, lest propinquity, gradually wasting itself in the orders of the offspring, should recede too far and lose its nature, to recover it by the bond of matrimony before it was too widely separated, and to recall it, as it were, before it fled away. In the form preserved by Cassiodorus, of obtaining the emperor's licence for the marriage of cousins, it is admitted, that the law which proscribes these marriages is not of God but of man, who had extended this modest observance farther than the law of God required.

[f] Brisson de Jure Con. Fr. Hotman de Rit. Nu. et Matr. c. 5. Bingham, b. xvi. c. 11. s. 4. See also the note of Fabricius Cod. Apocr. N. T. p. 470.

[g] Augustin. apud Gerhard.

Justinian was the author of another impediment of marriage, which he prohibited, where there was any spiritual relation between the parties, not allowing any man to marry the woman for whom he had been sponsor, alleging, that nothing produces a more paternal affection, or a juster prohibition of marriage, than this tie, by which their souls are in a divine manner united. The Council in Trullo, (A. D. 692,) enlarged this prohibitory rule, forbidding the sponsor to marry the mother of the infant for whom he was surety, under pain of separation, and afterwards of doing the penance of fornicators. In the progress of ecclesiastical arrogance and domination the canon law extended this relation to the person baptizing and the person baptized, and to the catechist and the catechumen, and insisted upon other degrees of spiritual kindred which might be extended to an absolute prohibition of marriage among Christians, who, by baptism and other ties, are united in a spiritual brotherhood[h].

The law of the empire and the practice of the Eastern Church could not fail to have a considerable influence in the construction of the Mahometan law of marriage, which was compiled from Jewish, Roman, and Christian rules, with the addition of some few original precepts, and interdicted the marriage of persons with whom the parents had been united; of mothers, of daughters, sisters, aunts, and nieces; of nurses and foster-sisters; of a wife's mother and daughters; of a son's wife, of a wife's sister, or of two sisters[i]. It was not long before the

[h] Bingham. [i] Selden de Jure Nat. et Gent. l. v. c. 11.

founder of the sect of the Druses relaxed even these simple restrictions, permitting the marriage of brothers and sisters, if not of parents and children also[k].

In the Eastern Church marriage was interdicted perpetually in the direct line of ascent and descent, but in the transverse line, or collaterally, it was permitted cautiously and with reserve in the sixth degree according to the civil law, which is the third degree of the canonical law, and admitted without any scruple or hesitation in the eighth degree of the civil, or the fourth degree of the canonical, law. Of marriage in the seventh or intermediate degree it was declared, that it was neither expressly forbidden nor expressly allowed, and that therefore such marriages are not permitted before they are contracted, but not dissolved afterwards. In the year 1055 this doubtful degree was declared unlawful under Michael, Patriarch of Constantinople. In respect of affinity the determinations of the Eastern Church

[k] Enc. Brit. Art. Druses; taken from Volney. "The ties of blood and friendship have no power among the Druses. . . . Examples are not wanting of their assailing the chastity of their mothers; and towards their sisters such conduct is so frequent, that a father never allows a full grown son to remain alone with any of the females of his family. Their own religion allows them to take their sisters in marriage, but they are restrained from indulging in the connexion on account of its repugnance to the Mahometan laws." Burckhardt's Travels in Syria. "The pagan Arabs for the most part abstained from marrying their mothers, daughters, aunts, both on the fathers' side and the mothers', two sisters, and their fathers' wives; though the Magians were frequently guilty of such incestuous marriages, which were allowed them by their prophet Zerdusht." Mod. Univ. Hist. v. i. p. 369.

are embarrassed and involved, and such as it is not easy to develope[l].

The rule of the Western Church cannot be understood without observing the different methods of computing the degrees by the civil and the canonical law. In the direct line of ascent and descent they are nearly agreed, counting so many degrees as there are generations, or as there are persons, exclusive of the forefather. Thus Abraham, Isaac, Jacob, Dinah: Dinah is in the third degree from Abraham, being the third person besides Abraham, or in the third generation from Abraham exclusively. In the transverse or collateral line there is a different mode of computation[m]. The civil law requires that the several generations arranged in separate columns shall be counted through the common parent, and determines that there are as many degrees as there are generations[n] exclusive of the common parent. Thus from Jacob to Thara there are three generations, and from Thara to Laban there are three generations; therefore Laban by the civil law is removed six degrees from Laban in the *lineâ collaterali æquali:* (3—3.) but by the canon law in the same line each is removed from the other as many degrees as both are removed from the common parent: thus Jacob and

Thara	
1. Nachor	1. Abraham
2. Bethuel	2. Isaac
3. Laban	3. Jacob.
4. Rachel.	

[l] Selden de Jure Nat. et Gen. l. v. c. 11.

[m] Per rectum filum concordant utraque jura;
Per transversalem superant legalia jura.

[n] Numera generationes et gradus numeraveris. *Beza.*

Laban are both removed three degrees from Thara, and therefore only three degrees from each other. Again, in the *lineâ collaterali inæquali*, (3—4.) by the canon law each is distant from the other only so many degrees as the more remote is distant from the common stock[o]: thus Rachel is distant four degrees from Thara, and therefore four degrees from Jacob: but by the civil law the whole number of generations on either side is reckoned, and 3+4=7, so that Jacob is removed seven degrees from Rachel[p].

The synodal decrees of the Western Church have been distributed into seven principal classes: 1. those which restrict the prohibitions by the rule of Scripture; 2. those which extend the prohibition to the second degree in *lineâ æquali*, (2—2.) or to first cousins; 3. those which extend the prohibition to the third degree in *lineâ inæquali;* (2—3.) 4. those which extend the prohibition to the third degree in *lineâ æquali*, (3—3.) or to second cousins; 5. those which prohibit marriage so long as there are any remains of consanguinity; 6. those which prohibit marriage in the sixth degree; 7. those which prohibit marriage in the seventh degree[q]. Those extensions of the Levitical restrictions of marriage with any one that is near of kin, to a degree which comprehends all consanguinity, or at least all such consanguinity as was supposed to be recognized in

[o] The rule deserves to be recited as an exquisite specimen of legal subtlety: Quæ personæ æqualiter a stipite distant, toto gradu distant, quanto quælibet a stipite distat: vel in ordine transverso, si duæ personæ æque distant a stipite, tot gradibus distare dicuntur, quot a stipite, quælibet illarum distat.

[p] Gerhard, s. 250, 251. [q] Ibid. s. 331, 332.

the civil law, and to regulate the descent of inheritance, and the consequent limitation of the restriction of marriage to the seventh degree, proceeded on a series of errors: for, in fact, consanguinity does not cease in the seventh or any other degree, but flows in perpetuity, as the stream from the fountain: the relation and the law of inheritance is recognized under the name of *consanguinei;* and the computation of the canonical and civil law is so different, that the seventh degree of the one would be the fourteenth of the other[r].

A concise summary of the prohibitions of marriage in the Western Church is contained in a canon of the Council of Agde, (A. D. 506.) which is repeated by the Councils of Epone (A. D. 517.) and of Tours, (A. D. 813.) and therefore may be considered as the settled law of the Church for a considerable period. "Concerning incestuous conjunctions, we allow them no pardon, unless the offending parties cure the adultery by separation from each other. We reckon incestuous persons unworthy of any name of marriage, and dreadful to be mentioned; for they are such as these: If any one pollutes his brother's relict, who was almost his own sister, by carnal knowledge; if any one takes to wife his own sister; if any one marries his stepmother, or father's wife; if any one joins himself to his cousin-german; if a man marries any one who is nearly allied to him by consanguinity, or one whom his near kinsman had married before; if any one marries the daughter of his uncle by the mother's or the father's side, or

[r] Selden de Jure Nat. et Gent. l. v. c. 11.

his daughter-in-law, that is, his wife's daughter by a former husband. All which, both heretofore and now under this constitution, we doubt not to be incestuous; and we enjoin them to abide and pray with the catechumens, till they make lawful satisfaction; but we prohibit these things in such manner for the present time as not to dissolve or cancel any thing that has been done before; and they who are forbidden such unlawful conjunctions shall have liberty to marry more agreeably to the law[s]."

By this canon it appears, that these incestuous unions were perfectly void and null; that the parties were not only required to separate, but forbidden to continue their union, and at free liberty to marry again. In a succeeding age the Pope Alexander II. extended the restrictions of marriage to the seventh degree[t], with an anathema upon any who should

[s] Conc. Agathen. can. 16. Bingham, b. xxii. c. 2. s. 3.

[t] Human ingenuity may discover a reason for every thing, but is it possible, that any man should for a moment be convinced by the reasons alleged for these restrictions of marriage to the fourth and the seventh degree. The argument of Innocent was, "Quia sint in humano corpore quatuor humores ideo ad quartum usque gradum, convenienter prohibitio extendatur;" which Bellarmine improves by the observation, "Esse tantum congruentiam quandam, non tamen ineptam, sed plane physicam. Quia enim homo ex quatuor elementis constat, collige admodum probabiliter, in quarto gradu penitus deficere vim illam sanguinis ejusdem, quæ a primo stipite trahitur." There was a reason also assigned by Bonaventura for the restriction to the seventh degree: "Quia corpus habet quatuor humores et anima tres potentias, quæ conjuncta faciunt septem, ideo in septimo demum gradu vim illam sanguinis deficere." Gerhard, s. 338. Another equally relevant reason was alleged by Gratian: "Quoniam sicut sex ætatibus finitur mundi generatio et hominis status, ita propinquitas generis tot gradibus terminatur." *Beza.*

attempt to revise the law, which was boldly incurred both by Innocent III. and Gregory IX. of whom the former in the Council of Lateran abrogated the rule of Alexander, and restricted the prohibition of marriage to the fourth degree of consanguinity and affinity, observing, that to prohibit marriage within the second and third degrees of affinity, and to restrain the issue of second marriages from intermarrying with the relations of the first, was a cause of perplexity, and prejudicial to the safety of the soul[u].

The discipline of the Church introduced other restrictions upon marriage, in respect of the time at which it should be celebrated. In the second Council of Arles (A. D. 251.) it was provided, that penitents should not marry during the time of their penance, under pain of not being permitted to enter under the roof of the Church[x]. In the Council of Laodicea (A. D. 361.) marriage was forbidden in Lent; and the Council of Salegunstade, (A.D. 1022.) under Benedict VIII. and the Emperor Henry II. made an order that no Christian should marry from Advent to the Octaves of Epiphany, nor in fourteen days before the festival of John the Baptist, nor upon fast-days, nor the vigils of solemn festivals. And from that time these were prohibited times of marriage in most countries[y].

The discipline of the Church had also interdicted

[u] Selden de Jure Nat. et Gen. l. v. c. 11. Fr. Hotman de Rit. Nu. et Matr. c. 6. Compare Bingham, b. xvi. c. 11. s. 3.

[x] Bingham, b. xviii. c. 2. s. 8.

[y] Ibid. b. xxii. c. 2. s. 14. Similar prohibitions, including all Sundays, Wednesdays, and Fridays, were adopted in the Collections of Egbert, Archbishop of York, (A.D. 750.) and in Concil. Ænham, (A. D. 1009.) Comber, Intr. Office of Matr. s. 4.

the marriage of the clergy. It is sufficient in this place to assert the direct opposition between this interdict and the plain rule of the Scriptures, which require both the Christian bishop and the Jewish priest to be the husbands of one wife, thus prohibiting polygamy, and giving sanction to the marriage of the clergy. Even the Pontifex Maximus[z] of the Romans, the very type of the sovereign pontiff, was not only to be married, but to be bound in an indissoluble bond of marriage: and the constrained celibacy of the Roman clergy can plead no better apology than the misapprehension of the writings of Saint Paul, the vagaries of the ancient heretics, and the precedent which is exhibited in the law of the Vestal Virgins, and the superseded rule of the Pythian Priestess[a].

While the Church constrained the clergy, the municipal law, in conformity with the arbitrary legislation of republican and imperial Rome, inhibited, or refused to sanction, the marriage of the slave: and it is the reproach of another age, and another country, that the record of the historian, concerning the condition of the feudal slave in respect of marriage, can hardly now be read without the con-

[z] Regem Seculi, Pontificem Maximum rursus nubere nefas est. Tert. ad Ux. l. i. s. 7.

[a] There is another example. "One of the conditions upon which a female is admitted into the order of the priesthood," in the kingdom of Dahomy in Africa, "is that of leading a life of celibacy, and renouncing the pleasures of the world, and but few are permitted to enter it at all; for during a residence of many months at Grewhe, one ceremony of the kind only was performed, at which I was present." Adams on the Country about Cape Palmas.

sciousness of perpetuated wrong. "They were not originally permitted to marry. Male and female slaves were allowed and even encouraged to cohabit together. But the union was not considered as a marriage: it was called *contubernium*, not *nuptiæ*, or *matrimonium*. This notion was so much established, that, during several centuries after the barbarous nations embraced the Christian religion, slaves, who lived as husband and wife, were not joined together by any religious ceremony, and did not receive the nuptial benediction from a priest. When this conjunction between slaves came to be considered as a lawful marriage, they were not permitted to marry without the consent of their master, and such as ventured to do so without obtaining that were punished with great severity, and sometimes were put to death. When the manners of the European nations became more gentle, and their ideas more liberal, slaves, who married without their master's consent, were subject only to a fine[b]."

The restrictions upon marriage had now reached their consummation; the primary liberty had been only not abolished; and the original restrictions had been carried far beyond all the wholesome purposes which they were intended to produce, to an extent which might seem to justify the suspicion that the rule was invented in anticipation of the profits of the dispensation. Of the dispensation itself it is obvious to remark, that if the rule were just, founded on a competent authority, and directed to a legiti-

[b] Robertson's Hist. Charles V. vol. i. Proofs and Illustrations, note ix.

mate object, reason and religion should have agreed in maintaining the law, and denying the right and power of the dispensation: or, if the dispensation was just, the rule was vicious, and such as should never have been published or enforced: they did not admit of a common and simultaneous vindication. The law of man should never have been put in competition with the law of God, either in the imposition or removal of restrictions; it was not fitting that man should justify or sanction what the Deity had pronounced to be sinful and void; or that he should restrain the free institution of God, or pretend to appeal to his name in confirmation of an union which was contrary to his commandments. But the æra had arrived in which the prohibition and restriction of marriage, and all the other abuses of a corrupt and insolent hierarchy, called for reform with a voice which could not be unheard, which the most interested could not suppress, and the most indifferent could not disobey.

The temper in which the Church of Rome entered in the council of Trent upon the ostensible work of reforming the rule of matrimony, may be conceived, from the presumption with which she proceeded to pronounce a curse upon men, and to place her own power on a level with the divine institutions; affirming, with an anathema upon those who should dispute the position, that the Church may dispense with the Levitical prohibitions of marriage in cases of consanguinity and affinity, and may also constitute other impediments of matrimony; that marriage not consummated may be annulled by the religious profession of either of the parties; that

priests may not marry, and that their marriage is null; that marriage may be interdicted at certain seasons; that marriage celebrated without the presence of the priest or some one having his licence or the licence of the ordinary, and without the presence of two or three witnesses, is void and null[c]. The same Council justly deplores the evils arising from the multiplicity of prohibitions, and that marriage, contracted in ignorance of these prohibitions, cannot be upheld without sin, nor dissolved without offence: but instead of abolishing the pretence of a spiritual relation, it only limited the number of sponsors to one, or at the most to one godfather and one godmother, and restricted the spiritual relation which should impede matrimony to these sponsors and the persons baptized, and the father and mother of the person baptized; to the person confirming, and the person confirmed; the father and mother of the person confirmed, and the person holding him. All other degrees of spiritual relation are abolished. The impediments founded in affinity acquired by fornication, are restricted to those who are related in the first and second degrees. If any man should marry within the prohibited degrees, they were to be separated without hope of dispensation; especially if they presumed to consummate the marriage, or to contract it, without the required solemnities. Dispensations of marriage were to be granted but seldom, and never in the second degree, except among great princes, and for public causes. Marriage be-

[c] Conc. Trident. Sess. xxiv. De Reformatione Matrimonii, Can. 3, 4, 6, 9, 11. Decret. cap. 10. 1.

tween the ravisher and the ravished is prohibited, until the woman shall have free power of choice. Penalties are pronounced upon the ravisher and all his abettors; and he is required, whether he marries the woman or not, to provide for her a suitable dowry. The marriage of vagrants was not to be solemnized without diligent enquiry and express licence from the ordinary[d].

The opinions of the continental Reformers were naturally opposed to those of the Church of Rome. Luther and Martin Bucer contended for the sole authority of the Levitical law, without which there was no impediment of marriage upon the ground of consanguinity; within which there could be no marriage, and which could on no account be dispensed with: affirming the validity of marriage in all other cases, notwithstanding any law or custom to the contrary; and alleging, that God was the best judge of what ought or ought not to be prohibited. Melancthon and Chemnitz also agreed in upholding the authority of the Levitical degrees; but they permitted other prohibitions in respect of degrees, provided, in the enforcement of those prohibitions, there was no infringement of the liberty or the integrity of conscience[e]. Beza, in the midst of many objections to the canonical computation, and to the papal restrictions upon marriage, constantly affirms the di-

[d] Decret. cap. 2, 4, 5, 6, 7. It was quite gratuitous to prohibit the marriage of the person confirming and the person confirmed, when the former with all the clergy was incapable of marrying at all.

[e] Gerhard, s. 291, 293.

vine authority of the Levitical prohibitions, the necessity of adhering to them, with an earnest wish that all Christian magistrates would be content to follow this only rule, instead of pretending to a wisdom beyond that of the Deity and the ancient civil laws. Some of these prohibitions he supposes to be divinely engraven on the heart, and to be maintained by a divine interposition: and he holds the distinction between marriages contracted in opposition to divine prohibition, which he pronounces to be null, and never to possess the character of matrimony, and those contracted in opposition to human authority, which he judges to be worthy of civil penalties, but nevertheless to be utterly indissoluble[f]. In the Constitutions of the electors of Saxony, of Maurice, (A.D. 1543.) and of Augustus, (A. D. 1580.) marriage is indefinitely restricted in the direct line of consanguinity; in the collateral line as far as the third degree *in lineâ inæquali* inclusively: and whatever degrees are forbidden in consanguinity, are also forbidden in affinity, properly and primarily understood, so that the husband shall not marry with the consanguinei of the wife, nor the wife with the consanguinei of the husband. Penalties are annexed, modified according to the proximity which is violated, and to the infringement of divine or human law by that violation: and it was also ordained, that the eighteenth chapter of Leviticus, and the scheme of prohibitions founded upon that chapter, should be annually recited from the pulpit.

[f] Beza de Repudiis et Divortiis.

In some few places a severer rule was adopted, and marriage was prohibited to the third degree in *lineâ æqualiⁱ*.

The firm spirit which resisted other encroachments of papal dominion, delayed the establishment in England of the canonical restrictions upon marriage; and Gregory the Great, in a letter to Augustin the Monk, which is still extant, admitted the policy and expedience of suffering the Anglo-Saxons to marry within the fourth degree, against the received rule of the age; and although the laws of Canute prohibited marriage within the sixth degree of relationship, as also with a godmother, a nun, and a divorced woman, and with more than one wife, still, in Scotland, the marriage of the step-mother and the brother's widow, and other customs contrary to the prevailing discipline were sanctioned, till they were abolished by Malcolm III.[h]

By the ancient law of England, marriage between Christians and Jews was declared to be felony; and the punishment was, that the parties should be burned or buried alive: and in the *Reformatio Legum*, proposed by Cranmer, the rule was retained, but mitigated: retained, by prohibiting the marriage of Christians with such as were not Christians, on the ground that such marriages must be prejudicial to the issue; and mitigated, by a reservation in

[i] Gerhard, s. 344, 345.

[h] Selden de Jure Nat. et Gent. l. v. c. 11. Christian Remembrancer, vol. iv. p. 721. In the council of London, A. D. 1102, secret marriages were declard invalid, and marriage within the seventh degree was pronounced illegal and incestuous. Ibid. vol. v. p. 137.

favour of such marriages as had been already contracted, that they should not be dissolved; because the apostle had ruled, that while the unbeliever was willing the contract should continue[i].

As the Reformation in England originated in a question upon the lawfulness of marrying a brother's widow, which involved the legitimacy of both Mary and Elizabeth, the attention of the Reformers was forcibly drawn to the state of the matrimonial law, in respect of consanguinity and affinity: and the statutes 25 Henry VIII. c. 22. and 28 Henry VIII. c. 7. advert in the preamble to the "many inconveniences which have fallen by reason of marrying within the degrees of marriage prohibited by God's laws," which marriages, although they be prohibited by the laws of God, "yet nevertheless at some time have proceeded, under colour of dispensation, by man's power," but are by these statutes prohibited for the time to come; and the meaning of the prohibition is defined by carnal knowledge both in and out of marriage; that "if it chance any man to know carnally any woman, that then all and singular persons, being in any degree of consanguinity or affinity to any of the parties so carnally offending, shall be deemed to be within the cases and limits of such prohibitions of marriage." There are fifteen degrees recited in these statutes; viz. 1. mother: 2. step-mother: 3. sister: 4. son's daughter: 5. daughter's daughter: 6. father's daughter by a step-mother: 7. father's sister: 8. mother's sister: 9. uncle's wife. 10. son's wife: 11. brother's wife:

[i] Burn's Eccl. Law, Art. Marriages, i. 3.

12. wife's daughter: 13. wife's son's daughter: 14. wife's daughter's daughter: 15. wife's sister. There are also fifteen degrees prohibited in the Levitical law: but the father's daughter by a step-mother is not included in the Levitical prohibitions; and the wife's mother, interdicted in Leviticus, is omitted in the statute.

The statute 32 Henry VIII. c. 38. which underwent many modifications, declared "all persons to be lawful, that be not prohibited by God's law to marry .... and no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees."

In reference to these statutes, it is again observed in the Reformatio Legum, This in the Levitical degrees is to be observed, that all the degrees by name are not expressly set down; for the Holy Ghost there did only declare, plainly and clearly, such degrees, from whence the rest might evidently be deduced. As, for example, where it is prohibited that the son shall not marry his mother, it followeth also that the daughter shall not marry her father. And by enjoining that a woman shall not marry her father's brother, the like reason requireth that she shall not marry her mother's brother. To which the same book adds two particular rules for our direction in the matter: 1. that the degrees which are laid down as to men, will hold equally as to women in the same proximity: 2. that the husband and wife are but one flesh; so that he who is related to the one by consanguinity, is related to the other by affinity in the same degree[k].

[k] "Gibson, 412." in Burn.

This parity of reasoning led to the exhibition of a more copious table of prohibitions of marriage, which was set out by Archbishop Parker, in 1563, of which the substance is annexed to the Book of Common Prayer, and which, with the omission of the Latin names, may be reduced to the following form, in which the first column represents the nature of the relation, whether by consanguinity or affinity.

"*An Admonition to all such as shall intend hereafter to enter the State of Matrimony godly and agreeably to laws.*

"First, That they contract not with such persons as be hereafter expressed, nor with any of like degree, against the law of God and the laws of the realm.

"Secondly, That they make no secret contracts without consent or counsel of their parents or elders, under whose authority they be, contrary to God's laws and man's ordinances.

"Thirdly, That they contract not anew with any other, upon divorce and separation made by the judge for a time, the laws yet standing to the contrary.

Marriage is honourable among all men, and the bed undefiled; but whoremongers and adulterers God will judge. Heb. xiii. 4.

To avoid fornication, let every man have his wife, and let every woman have her husband. He that cannot contain let him marry: for better it is to marry than to burn. 1 Cor. vii. 2, 9.

Unto the married, I command, not I, but the Lord. Let not the wife depart from her husband; but if she depart let her remain unmarried, or be reconciled to her husband; and let not the husband put away his wife. 1 Cor. vii. 10, 11.

"I. It is to be noted, that those persons which be in the direct line ascendant and descendant cannot

marry together, although they be never so far asunder in degree.

" II. It is also to be noted, that consanguinity and affinity (letting and dissolving matrimony) is contracted as well in them and by them which be of kindred by the one side, as in and by them that be of kindred by both sides.

" III. That by the laws consanguinity and affinity (letting and dissolving matrimony) is contracted as well by unlawful company of man and woman, as by lawful marriage.

" IV. Item. In contracting betwixt persons doubtful, which be not expressed in this table, it is most sure first to consult with men learned in the laws, to understand what is lawful, what is honest, and expedient, before the finishing of their contracts.

" V. Item. That no parson, vicar, or curate, shall solemnize matrimony out of his or their cure, or parish church, or chapel, and shall not solemnize the same in private houses, nor lawless or exempt churches, under the pains of the law forbidding the same. And that the curate have their certificates when the parties dwell in divers parishes.

" VI. Item. The banns of matrimony ought to be openly denounced in the church by the minister three several Sundays, or festival days, to the end that who will and can allege any impediment may be heard, and that stay may be made till further trial, if any exception be made then against it, upon sufficient caution.

" VII. Item. Who shall object a frivolous impediment against a lawful matrimony, to disturb the same, is subject to the pains of the law.

" VIII. Item. Who shall presume to contract in the degrees prohibited, (though he do it ignorantly,) besides that the fruit of such copulation may be judged unlawful, is also punishable at the ordinary's discretion.

" IX. If any minister shall conjoin any such, or shall be present at such contracts-making, he ought to be suspended from his ministry for three years, and otherwise to be punished according to the laws.

" X. Item. It is further ordained, that no parson, vicar, nor curate, do preach, treat, or expound, of his own voluntary invention, any matter of controversy in the Scriptures, if he be under the degree of a Master of Arts, except he be licensed by his ordinary thereunto, but only for the instruction of the people read the Homilies already set forth, and such other form of doctrine as shall be hereafter by authority published, and shall not innovate nor alter any thing in the Church, or use any old rite or ceremony, which be not set forth by public authority.

" None shall come near to any of the kindred of his flesh, to uncover their shame. I am the Lord. Levit. xviii. 6.

	" A man may not marry his	*A woman may not marry her*
	" (Secundus gradus in lineâ rectâ ascendente.)	
Cons.	1. Grandmother,	1. Grandfather,
Aff.	2. Grandfather's Wife,	2. Grandmother'sHusband,
Aff.	3. Wife'sGrandmother.	3. Husband's Grandfather.
	" Secundus gradus inæqualis in lineâ transversali ascendente.	
Cons.	4. Father's Sister,	4. Father's Brother,
Cons.	5. Mother's Sister,	5. Mother's Brother,

Aff.	6. Father's Brother's Wife,	6. Father's Sister's Husband,
Aff.	7. Mother's Brother's Wife,	7. Mother's Sister's Husband,
Aff.	8. Wife's Father's Sister,	8. Husband's Father's Brother,
Aff.	9. Wife's Mother's Sister.	9. Husband's Mother's Brother.

" Primus gradus in lineâ rectâ ascendente.

Cons.	10. Mother,	10. Father,
Aff.	11. Stepmother,	11. Stepfather,
Aff.	12. Wife's Mother.	12. Husband's Father.

" Primus gradus in lineâ rectâ descendente.

Cons.	13. Daughter,	13. Son,
Aff.	14. Wife's Daughter,	14. Husband's Son,
Aff.	15. Son's Wife.	15. Daughter's Husband.

" Primus gradus æqualis in lineâ transversali.

Cons.	16. Sister,	16. Brother,
Aff.	17. Wife's Sister,	17. Husband's Brother,
Aff.	18. Brother's Wife.	18. Sister's Husband.

" Secundus gradus in lineâ rectâ descendente.

Cons.	19. Son's Daughter,	19. Son's Son,
Cons.	20. Daughter's Daughter,	20. Daughter's Son,
Aff.	21. Son's Son's Wife,	21. Son's Daughter's Husband,
Aff.	22. Daughter's Son's Wife,	22. Daughter's Daughter's Husband,
Aff.	23. Wife's Son's Daughter,	23. Husband's Son's Son,
Aff.	24. Wife's Daughter's Daughter.	24. Husband's Daughter's Son.

" Secundus gradus inæqualis in lineâ transversali descendente.

Cons. 25.	Brother's Daughter,	25. Brother's Son,
Cons. 26.	Sister's Daughter,	26. Sister's Son,
Aff. 27.	Brother's Son's Wife,	27. Brother's Daughter's Husband,
Aff. 28.	Sister's Son's Wife,	28. Sister's Daughter's Husband,
Aff. 29.	Wife's Brother's Daughter,	29. Husband's Brother's Son,
Aff. 30.	Wife's Sister's Daughter.	30. Husband's Sister's Son."

Upon the review of this Table it is obvious to approve its method of explaining the cases in which the marriage is forbiddén, with such clearness and distinctness that no man can misapprehend or pretend to be ignorant of the prohibition, and with such fulness as to leave the doubtful cases of very rare occurrence. It is impossible also not to approve its approximation to a scriptural standard, its establishment on a scriptural basis, not indeed with the brevity which marked the earlier statutes, or with the precision of Luther and Bucer, but nevertheless without any deviation from the Levitical law, except in useful redundance or unavoidable inference. It is true, that the Table contains many more names of relations than are expressed in the Levitical law, which are however rightly added from parity of reasoning, and are marked on each side of the Table, 1, 2, 3, 7, 8, 9, 13, 21, 22, 25, 26, 27, 28, 29, 30. The prohibition of some of these marriages is necessarily implied in the interdicts which are expressly delivered. Thus if a man is forbidden to

marry his granddaughter, and a woman her grandson, (19, 20.) the grandson and the granddaughter are forbidden to marry their grandfather and grandmother, (1, 2.) and the expression of these prohibitions has therefore no fault but repetition and redundance. Again; a man is forbidden to marry his father's brother's wife; (6.) his mother's brother's wife (7.) is related to him in the very same degree, and is added by necessary inference. "Though marrying a wife's sister be not expressly forbid in the eighteenth of Leviticus, yet by parity of reasoning it is virtually implied. For when God there commands that a man shall not marry his brother's wife, which is the same as forbidding the woman to be married to her husband's brother, it follows of course, that a man is also forbid to marry his wife's sister. For between one man and two sisters and one woman and two brothers there is the same analogy and proportion. Thus again; though we are not forbid in terms to marry the daughter of a wife's sister, yet by the like parity of reasoning the same is implied in the prohibition of marrying one's father's brother's wife, which is the same as to forbid the being married to a husband's brother's son. For between a man and his wife's niece is the same relation as between a woman and her husband's nephew: and therefore these also have been declared incapable of marrying by our courts of judicature. And if this be granted, it can much less be doubted whether the like rule from parity of reasoning doth not forbid the uncle to marry his niece, which, though not expressly forbidden, is to be sure virtually prohibited in the precept that forbids the

nephew to marry his aunt. Nor is it of any moment to allege, that the first is a more favourable case, because the natural superiority is preserved, since the parity of reasoning, which is the proper rule of judging, is the very same in both.

Nor do these rules hold only in lawful marriages, but are equally binding in unlawful conjunctions; for by the same rule that a man may not marry his father's wife, he ought not to take his father's concubine. . . . Nor are bastard children any more at liberty to marry within the degrees of the Levitical law than those which are legitimate. In this case legitimacy or illegitimacy makes no difference; for if it did, a mother might marry her bastard son, which is shocking to think of[1]."

It is of marriages contracted in opposition to these restrictions, that the words in the Office of Matrimony will be most appropriately interpreted, which relate to the "cause or impediment why the parties may not be lawfully joined together," and to the circumstances "contrary to God's word," under which they "are not joined together by God, neither is their matrimony lawful." Such marriages are by the ninety-ninth canon "adjudged incestuous and unlawful, and consequently shall be dissolved as void

[1] Wheatly's Illustration of the Common Prayer, chap. x. sect. iii. s. 2. See also Burn's Eccl. Law, with cases in point. But does the Scripture or the English law recognize such incorporation of the man with the woman, as to make the *consanguinei* of the one the *affines* of the other, and to give to the bastard any relations by affinity? The Jewish and the Lutheran interpreters restrict the incest, precluding marriage, to matrimonial intercourse.

from the beginning; and the parties so married shall by course of law be separated." Such marriages are not, however, necessarily followed by the nullity, which is the ordinary penalty of incest; and the English law, which is scrupulous in defining the offence, takes no active part in demanding the punishment, but leaves to the ecclesiastical magistrate the separation of the offenders, and the infliction of punishment for the offence *pro salute animarum*. But such marriages, although absolutely unlawful, not being void *ab initio*, but voidable only by sentence of nullity and separation, are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void: because such declaration cannot now tend to the reformation of the parties[m]. It is only when the marriage is thus entirely dissolved, that the issue are bastards. It has been often supposed, that the avoidance of such marriages may be prevented by a fictitious suit, at the instance of either of the parties, which by the law's delay may never be brought to issue: but they may also be avoided at the suit of third persons, whose interests may be prejudiced or likely to be prejudiced by such a connexion, and who shall exhibit satisfactory proof of the interest on which they ground the right of interference. The parties are also liable to ecclesiastical punishment, for the crime of incest, on the presentment of the persons

[m] Blackstone's Com. b. i. c. 15.

lawfully authorized to notice the offence; so that in a proceeding of this nature, technically called a Cause of Office, the nullity of the marriage becomes an incidental question, necessarily proved by the evidence which establishes the offence, and is disposed of by a declaration of its nullity, before the parties are pronounced guilty of the incest[n].

It is a difficulty which has perplexed many ingenuous minds, and which has been sometimes argued with considerable flippancy, that first cousins may, and that second cousins may not, marry. The difficulty has probably arisen from the different provisions of the civil and canonical laws, of which the former permitted the marriage of first, as the latter, extending its prohibitions to the fourth degree, precluded the marriage of second cousins[o]. In England, however, "no cousins whatsoever, whether in the first, second, or third descent, are prohibited marriage, either by the laws of God or of the land. The more ancient prohibition of the canon law was to the seventh generation; and the same was formerly the law of the Church of England, as appears by the canons of two different councils. But in the fourth council of Lateran, which was held A. D. 1215, the prohibition was reduced to the fourth degree; as appears, not only by a statute in the thirty-second of Henry VIII. but also by the frequent dispensations for the fourth degree and no

[n] Poynter's View of the Doctrine and Practice of the Eccl. Courts, c. 7.

[o] Burn's Eccl. Law. "It is observable, that neither uncles and nieces, nor even cousins, are permitted to marry" among the Caffres. Enc. Metr.

farther, which we meet with in our ecclesiastical records, as granted by special authority from Rome. But now this was only for the increase and augmentation of the pope's revenue, who always took care to be well paid for his licence or dispensation. And therefore, at the Reformation, when we got free from our bondage and subjection to him, no marriages were permitted but within the third degree, which are expressly prohibited by the laws of God, as well as by the dictates of right reason, and which, therefore, no power or authority can dispense with. But now none that we call cousins are within the third degree of kindred: even first-cousins or cousin-germans are four removes distant[p]."

There are other civil disabilities, created or enforced by the municipal laws of England, which render the marriage thus contracted, not voidable but void; and if any persons under these circumstances come together, it is by a meretricious, not a conjugal union. These disabilities are, 1. a prior marriage, which necessarily precludes any other marriage: 2. want of age: 3. want of reason, without which no lawful contract can be formed; and, 4. want of legal solemnization to ratify the contract. No just exception can be made to these disabilities, or the nullity which they imply. There is another impediment, which is but rarely agitated, and of which the proof and the discussion are so offensive, that public morals should prevail over private inconvenience in some method of silently effecting its suppression. In the marriage of a dumb person a sign

[p] Wheatly, ubi supra.

is a sufficient evidence of assent. Marriage is not restricted at any season of the year; nor is a woman, although it was the law before the conquest, prohibited from marrying at any time after her husband's death[q].

The tedious prolixity of this discussion of incestuous and illicit marriages, admits the addition only of a very brief recapitulation; that in all ages, in all countries, and under all dispensations of religion, various restrictions have been laid upon marriage; that these restrictions have been carried to an extent which is not required by any moral policy, or justified by any religious authority; and that in England these restrictions are explicit and distinct, and established upon a Scriptural foundation.

[q] Blackstone and Burn.

SECTION II.

Marriage of Minors without consent of parents or guardians.

IT is a subject of anxious and delicate enquiry, which respects the necessity and force of the consent of parents to the marriage of minors, and the validity of marriages contracted without that consent. The question has been debated upon various occasions, especially at the time of the Reformation between the Romanists and the Lutherans, and at the time of the enactment and the revision of the English Marriage Act of 1754. The most offensive provisions of that statute have now been repealed, but it may nevertheless be permitted to examine the grounds upon which they were made to rest, and without disputing the wisdom of laws which prohibit the marriage of minors without consent, by penalties short of nullity, to shew that the consent of parents or guardians is not so necessary, that the want of it annulls the vow of the parties; and that the marriage of minors without consent is not a marriage contracted otherwise than God's word doth allow, and is not therefore intrinsically void, and should not be avoided by the statute.

There can be no question of the moral necessity of a parent's consent to the marriage of his children, or of the moral duty of soliciting and obtaining that consent. Reason and Scripture, precepts and precedents, laws civil and canonical, all agree in confirming the obligation of children to defer to the

advice and experience of their parents, as in all other cases, so in the most important concern of their marriage. The natural anxiety of the parent, which never ceases to watch for the welfare of the children, will be jealous of the tendency of their affections, and win them from objects, on which they ought not to rest, without offering an unwise and unavailing opposition to a prudent and honourable inclination. The wisdom of the primitive Church[a] required of parents to make early provision for the marriage of their children, that they might not be tempted to fall into vicious connexions; and it is no part of the duty of parents to throw impediments in the way of marriages, to which there is no moral objection; in which there is a promise that the duties of marriage will be adequately performed; and the great ends of marriage, the mutual comfort of the parties, and the religious instruction of the offspring, will be fulfilled. But it is an ill requital of parental love, and it is unworthy of the ingenuousness of youth, to conceal or disguise the first impression: and it is the plain duty of children, to seek the consent of their parents, to listen to the suggestions of experience, to comply with the will of affection, and to conceive that the opposition to young desires may arise from better motives than churlish apathy or designing interest. The reluctance of the parent should always be met by the most conciliatory submission on the part of the

[a] Const. Apostol. l. iv. c. 11. The Julian law contained a similar provision, obliging the parents to give their children in marriage when they unjustly restrained them. Brisson de Jure Con.

child ; and the strongest passion should be subdued to the great duty of filial piety. The ardour of the lover should never absorb the reverence which becomes the son, who should never leave the parental roof but in the assurance of returning in peace and mutual congratulation. The relations of parent and child are such as death only can dissolve ; the care of the one and the gratitude of the other should never cease : and whenever a man shall leave his father and mother to cleave unto his wife, the conjugal union should be sealed by the blessing of his parents ; the accession of new affinities should be hailed with feelings of mutual benevolence ; and the line of descent be extended without any interruption of natural affection.

There is no austerity in affirming, that to marry against the will of a parent is an act for which the most sedulous discharge of conjugal duties will hardly afford an adequate atonement, and that the precipitancy and temerity with which such marriages are contracted threaten to produce, and in practice are often found to produce, the worst and most pernicious effects. On the part of the woman they are more especially offensive, and liable to the imputation of at least a very defective sense of propriety. The purest of all earthly love has been said to be that which subsists between a father and a daughter ; and when that love is transferred by the woman, and in the peculiar delicacy of her situation at the time of her marriage, she finds relief in the consideration that she acts under the authority and advice, and with the entire concurrence, of her

father. There is a striking elegance in the fiction under which the father gives his daughter, and under which the Church, respecting the modesty of the woman, and supposing her incapable of alienating herself, asks, Who gives her away to be married? But what must be the reflexions of that woman, if she has the sense to reflect, who, in defiance of her father's will, gives herself away, and betrays at once a callousness or a carelessness to the dutiful affection of the daughter, and the retiring delicacy of the woman? On this subject there is much wisdom in the words of an ancient father of the Church, who teaches, that the young woman is not consulted upon the espousals, in which she depends on the judgment of her parents, nor is it the part of virgin modesty to make choice of a husband, which is rather left to the parents, that she may not be charged with forwardness, in claiming the right of choice in her own marriage. She should rather appear to be sought by her husband, than to make the choice herself, and to put on the appearance of delicacy and reserve, by which her marriage may be the more approved[b].

There is not an argument which can be alleged in palliation of the woman's temerity in marrying without the will of her parents, or which can impair the general duty and obligation of deferring to that will. This is a duty which the heathen and the Christian agree in supporting by every argument and persuasion of reason and religion, which it is not

[b] Ambros. de Abraham. l. i. c. ult. apud Gerhard.

unworthy of a wise and prudent legislature to enforce by the penalties of human law, and of which the neglect is in England and some of the continental states followed by forfeiture, disinheritance, fines, imprisonment, and other punishments.

The policy of prohibiting and restraining under various penalties the marriage of minors without consent of parents rests on very different grounds from the assertion of their nullity or invalidity. The former power may be necessary to vindicate the just authority of the parent; the latter is such an infringement of the personal independence of the child, and such an interference with his civil and religious engagements, as should not be admitted but upon principles free from exception, or capable of bearing the severest and most rigorous examination.

But whether marriage be considered simply as a civil contract, or as a religious vow made in conformity with a divine institution, it is difficult to conceive its entire nullity under any circumstances in which the parties are capable of understanding and fulfilling the vow, and are not forbidden by the Deity, in whose name it is made, to contract it. Infants, because they cannot fulfil, and idiots, because they cannot understand it, incur no matrimonial obligation: and if the force of the obligation depended on the intervention of any third person, the grounds upon which the child and the idiot are exempted, would be removed. The exception proves the rule in all other cases, and enforces the bond, wherever it is not necessarily precluded. It shews that the man and the woman are the only persons by whom the marriage can be, and without

whom it cannot be, contracted: and the exclusion of the effective consent of third persons is a primary objection to the nullifying power of their dissent. If marriage be a contract between two persons, it is not in the power of a third person to discharge another from an engagement in which he has not power to bind him: and if it be a religious vow, it is dangerous to introduce the doctrine of dispensing with oaths, which bind the conscience. Nor can the parties nullify their own act, unless they have reserved to themselves a conditional power of rescinding it: but such reservation is contrary to the essential perpetuity of marriage. The man who takes to himself a woman whom he may dismiss, takes to himself a concubine, and not a wife; and he cannot nullify, because he has not contracted marriage. The objections to nullity of marriage, considered in its simplest form, are confirmed, if it be contemplated as a religious vow, involving perjury in its violation; or if it be contemplated in its effects upon the woman, on whom it affixes a meretricious character; and upon the issue, whom it corrupts with the stain of bastardy.

It is admitted, that when the parents have given their consent they have not the power of retracting it: but it is contended, that they have the power of nullifying the contract which their children have made. If the consent of parents is thus necessary to the validity of marriage, it is natural to ask, between whom is the contract to be made? between the parents and the children on both sides, or between the parents only, without the concurrence of the children? And what shall be the rule of judgment,

if the parents of the one party assent, and the parents of the other dissent? or if the one party, being of age, is bound by his assent, and the free consent of the minor is controlled by the dissent of the parent? When it is held, that the consent of the contracting parties, being of competent age and understanding, publicly and irrevocably declared, is all which is essentially necessary to the validity of marriage, the law is clear, definite, and distinct: a man knows his wife, and a wife knows her husband: but when the validity of the marriage is made subservient to the consent of the parents, and the obligation of the contract is suspended on their interference, the law is embarrassed and involved, and a man may never know whether he is or is not married.

It is commonly pretended, that in respect of marriage children are not independent, or *sui juris*, and the pretence is just with reference to the Roman law, which ascribed to the parent over the child the power of an owner over a thing, and a necessary incapacity of alienating itself. Such power it was consistent with the arbitrary character of a Roman father to assume, but it is incapable of vindication. In respect of marriage, an original licence was given to every man to leave his father and mother, and cleave unto his wife; a licence, only restricted by the prohibition of incestuous marriage; claiming the appropriation of every man in the growth of those affections which lead to marriage; subject to no other limitation besides the competence of discharging the conjugal obligations, and such maturity in the constitution of the mind and the body as is requisite to a right apprehension of the nature of marriage, and

to the fulfilment of its great purposes of mutual society, the religious education of children, and the maintenance of a family, which supposes a capacity of sustaining labour and privation. The liberty of marriage under these restrictions is of divine origin and institution, and beyond the control of human law. The moral and remedial uses of marriage are such as can hardly be reconciled with a dependent right, or be renounced or controlled without a temptation to offence[e].

Writers who maintain the nullity of marriages contracted without consent of parents have found it necessary to make many exceptions in the practical application of the principle for which they contend. They who deduce it from the paternal authority, laid down in the Roman law, assert, that it is unconditional and unrestricted; others, who make the necessity of consent dependent on the duty of filial reverence, are obliged to admit modifications of the necessity, to limit the period of minority, and to take into consideration the previous conduct and care of the parents. Some deny the common right of parents, and contend only for the operation of local and particular laws, superseding the right of nullity, and substituting secondary penalties for the neglect of consent. Such fluctuations of opinion are not favourable to the establishment of a practical truth.

The period to which the necessity of consent is limited, and within which the marriage contracted

[e] Inquiry into the force and operation of the annulling clauses in a late Act of Parliament for the better preventing of Clandestine Marriages, with respect to conscience. London, 1754. p. 7—15.

without it is void, is variously defined. By the Roman law, and by the constitutions of Saxony and of Wirtemberg, it was not terminated by any age. Other countries have mitigated the rigour of this law: thus, in France, the son cannot marry till thirty years of age, nor the daughter till twenty-five; in Holland and in Pomerania, the sons are at their own disposal at twenty-five, and the daughters at twenty. In other places the sons may marry at twenty-four. In England the minority and the necessity of consent expire together at twenty-one[d]. So arbitrary is the restriction upon the paternal power, the main principle of nullity of marriage.

If the parents should die during the minority of the children, the English marriage law of 1754 required the consent of guardians legally appointed, or of the High Court of Chancery: but the Roman law, the original of the right of nullity, while it preferred the consent of the paternal grandfather to that of the natural father, gave no authority to guardians in the marriage of the ward beyond the settlement of the dower. Neither did the Saxon nor the Salic law confer a right of nullity upon the guardian, whose consent was required in some countries of right, in others of duty, and the want of it was made penal absolutely, or at the discretion of the judge. Specious arguments have been alleged both in favour and to the prejudice of the guardian's right, which, if they are weighed in an equal balance, they are

[d] 1 Bl. Com. c. 15. Schott. Adnot. Jurid. ad Gerh. De Conjug. ad s. 93.

hardly capable of sustaining[e]. But if the father's power cannot be delegated, and necessarily ceases with his natural life, his consent cannot be absolutely necessary to the validity of the marriage, or orphan children would be precluded from marriage. The concurrent or independent power of the grandfather, peculiar to the Roman economy, while it extends the paternal power in one relation, controls and contracts it in another.

If the mother should survive the father, her consent, under pain of nullity, was necessary to the marriage of a minor, and sufficient during her widowhood, by the English law. But the Roman law, maintaining exclusively the paternal power, gave no authority to the mother. The laws and practice of Germany admit the equal rights of both parents, and upon the death of either parent convey the whole power to the survivor: on the death of both parents the care of the children, in respect of marriage, devolves on the paternal grandfather, or the nearest relations, who have not however the right of dissolving the marriage contracted without their consent, which is required only under particular constitutions. The most scrupulous care is also required in restricting the liberty of children in the contract of marriage, and it is an admitted axiom, that there is not less offence in uniting those who should not be united, than in separating such as should not be separated[f].

[e] Brisson. de Ju. Con. Gerhard, s. 93. Schott. ad s. 94.

[f] Schott. ad s. 96, 97. Gerhard, s. 96. So it is admitted, non quidem matrimonium absque parentum consensu contrahendum

If the right of nullity is abated by the defective provisions which have been made for supplying the power of the deceased parent, it is further invalidated by the restrictions laid upon him during his life.

In the case of a father's captivity, and consequent incapacity of consenting, the old Roman law forbade the children to marry during his captivity, or permitted him to avoid the marriage on his return. The extreme rigour of this law was modified, and an interval of three years was prescribed within which the children might marry, upon condition that the marriage was suitable and not displeasing to the father, and at the expiration of which the marriage would be confirmed. Thus the paternal power was suspended for an arbitrary period, and the right of nullity was also suspended on the circumstances of the father, and the opinion which he might form of the character of the marriage[g].

The same limitation was applied in the case of an absent father by the Roman law: in Germany the advice of near relations and of the ecclesiastical judge is recommended for more security[h]: in England the return of a father has vitiated a marriage contracted without his consent, on the supposition of his decease.

If the father be insane, the English law requires the consent of the guardian. In ancient Rome the grandfather gave consent; but the consent was not

esse; si tamen contractum fuerit, non esse dissolvendum. Multa impediunt matrimonium contrahendum, quæ non dirimunt contractum.

[g] Schott. ad s. 99.

[h] Ibid.

required for the marriage of the daughter of a madman, and Justinian confirmed the same immunity to the son[i]. It is reasonable, that a man incapable of contracting marriage for himself should not be the arbiter of the marriage of another: but it is nevertheless an infringement of the father's power and right of nullity, and abates the necessity of his consent, by affirming the marriage contracted without it.

If these are called extreme cases, cases in which the paternal power is inoperative, there are other cases admitted by the advocates of nullity, in which there is a positive restriction of the agency of the paternal power.

The impiety of a father does not supersede his paternal relation, or the necessity of his consent: but if his dissent is grounded in his impiety, the child may appeal to the judge, and thus the father's power will be controlled, and the necessity of his consent avoided[k].

If the parent neglects his duty, and unjustly, and for the sake of private advantage, obstructs the marriage of his children, they may appeal to other relations and to magistrates, who may assume the rights of the father, and give authority to a marriage contracted without his consent[l].

If parents are harsh and severe in opposing the marriage of their children, their consent may in the same manner be dispensed with. This was the opinion of Luther, and the rule of the civil and the Julian laws: but the exception is of large extent,

[i] Fr. Hotman de Rit. Nu. et Matr. c. 3. [k] Schott. ad s. 91.
[l] Gerhard, s. 76.

for gentle and easy parents will not oppose the marriage of their children[m].

A distinction is made between children who after marriage without consent submit themselves to the will of their parents, and such as persist in opposing their will[n]. This is a wide deviation from the main principle of nullity. If the marriage without consent is void in itself, the subsequent behaviour of the children, which is independent of any conceivable principle of nullity, cannot remedy the defect.

Another irrelevant distinction is made between marriages contracted with persons of honourable and equal condition, and those contracted with persons of mean and unequal rank[o]. Whatever be the principle of nullity, it cannot be affected by the condition of the parties; and what is honourable to the one will be degrading to the other. If the validity of the marriage rests on the consent of the parent, the circumstances of the parties cannot confirm it.

If children marry without the privity of their parents, the marriage is null; and the parents are not bound to assign the reasons of their dissent. Otherwise the dissent of parents was not arbitrary, but liable, under the Poppæan law, to the revision of the prætor. So in Germany, the power of the parent, being for the benefit of the child, may not be arbitrarily exercised; and the ecclesiastical judge may examine the reasons of his dissent, and in his discretion either inhibit the marriage, or restrain the

[m] Gerhard, s. 58, 90. A similar provision was introduced into the Reformatio Legum.

[n] Gerhard, s. 58. [o] Ibid.

prohibitory power of the parent and give lawful sanction to the marriage[p]. This is another infringement of the paternal power, and another abatement of the strict necessity of consent. The English law was inflexible; if the required consent was not given, the marriage was irretrievably void.

It is admitted, that if the parent does not dissent, his virtual acquiescence may be assumed. It has been conceived, that the assent needs not to precede the marriage; but the retrospective operation of a subsequent consent has been very properly disputed. If the marriage without consent be actually null, it cannot be amended: but in many of these cases the marriage is rather voidable than void; a distinction not very consistent with the true principle of nullity. A distinction is also frequently made between the right and the exercise of the right: and yet, if the validity depends on the right, it is difficult to conceive how it can be established by the neglect of the right.

If a marriage contracted without consent shall be consummated, and followed by the birth of issue, it is contended, that if the principle of nullity without consent be admitted, a vicious marriage cannot be amended by a vicious intercourse. The position is opposed by the authority of Luther and Melancthon, who argue, that after consummation, the rights of the parent and the wife conflict; that the injury of the woman is irreparable if the marriage be not confirmed; and that consummation ratifies the marriage. The apologists of nullity also admit, that the woman,

[p] Gerhard, s. 89. Schott. ad s. 89, 90.

seduced by a promise of marriage, is entitled to redress; that marriages so contracted and consummated ought not to be lightly rescinded; and that many things which should prevent the contract do not dissolve it after it is made[q]. If there be any weight in these reasons, they destroy the vital necessity of the consent, by affirming the marriage which is solemnized without it, and thus giving to clandestine consummation a force equivalent to the paternal authority.

On the effect of the ecclesiastical benediction it has been argued, that it cannot make that legal which is in itself illegal, or supersede the necessity of consent: while others have contended, that when the vow of marriage has been made, it behoves parents to exercise their power with moderation, and to consider the hazard of their children's souls[r]. This argument proceeds on the principle, that it is rather the duty of children to solicit, than the right of parents to enforce, consent. This is the principle of the humane law of Wirtemberg. Others, overlooking the right of nullity and the rules of Roman jurisprudence, contend that marriage is an actual emancipation of the child, in virtue of which the filial merges in a higher and indissoluble relation.

It has now been shewn that nullity, consequent upon want of consent, is incompatible with the nature of marriage, and that the difficulty of the application, and the many cases of unavoidable exception and very subtle distinction, are sufficient to

[q] Gerhard, s. 75, 82, 58, 99. Schott. ad s. 83. [r] Schott. ad s. 82.

destroy the force of the principle in dispute. The writers who contend for this principle have nevertheless made it to rest upon authority which requires to be obviated or obeyed.

The necessity of the parent's consent to the validity of the marriage has been inferred[s] from the terms of the divine institution. The inference is certainly not very obvious, and it is not noticed in any of the Christian or Jewish commentaries, collected by Ainsworth and Poole. The text is again and again recited in the Old and in the New Testament, without an allusion to the consent of parents; in the reproofs of divorce the want of it is never alleged in justification or excuse of the practice; nor is there the faintest or most distant allusion to the doctrine in the forms of Jewish marriage or Jewish divorce. There are many cases in which marriage is expressly forbidden; and a marriage contracted in violation of the prohibition is held to be null, because it not only wants, but opposes the divine authority: but there is no such interdiction of marriage without consent of parents. It must have been foreseen in the primary institution of marriage, that many cases would occur, in which the consent of the parent would be almost, if not altogether impracticable: and if the consent was so necessary as is alleged, it would have been guarded by the authority, not of a remote and doubtful inference, but of a clear and positive command. The nullity of marriage without consent is however so far from being authorized, that the necessity of consent is

[s] Gerhard, s. 59.

almost superseded in the sentence, that the man shall leave his father and mother; not, that they shall permit or command him to depart, but that he shall leave them, as it were by his own act, and in the exercise of his own discretion. It is a fanciful gloss, that, according to the plan and method of the divine institution, Adam did not of his own will choose Eve for his wife, nor did Eve make choice of Adam, but by the interposition of the Almighty, who gave Eve as his daughter to Adam, with an ample dowry. It was the remark of Luther, that Adam did not seize Eve to himself, but waited the offer of God, who in this action gave example to parents to provide for the marriage of their children. The nullity of marriage without consent is a bold inference even from these commentaries.

The right of nullity has also been inferred[t] from the fifth commandment, which only prescribes the duty of children, without any intimation of the authority of parents to annull a marriage contracted without their consent; in which the child makes use of a privilege conferred by Him that is greater than any earthly parent. This command would convey equal power to both parents, which the Roman law, the true origin of nullity, does not admit; in the exercise of which there might be the most perplexing disagreement; and under which the combined influence of the several parents could only extend to their own children.

[t] Gerhard, s. 60. Beza de Divortiis et Repudiis. See also Stebbing's Dissertation on the power of states to deny civil protection to the marriage of minors, p. 16.

The right of nullity is again assumed from the right of the parent to disallow the vow of his unmarried daughter[u]. An exception might be made to the very circumstance of the daughter's being unmarried; from which the state of marriage might appear to be essentially distinct, and to be a virtual emancipation: the vow is restricted to a vow unto the Lord; and the power of disallowing it is after the marriage conveyed to the husband, and is only permitted to the father during his daughter's continuance in his house, when it might be injurious to his interest, because she might vow more than she could redeem. In both cases it is expressly said, that the Lord will forgive her if her parent or her husband disallow her vow: if the parent could plead the same authority for annulling the vow of marriage, all objections would be removed. In these respects the vow unto the Lord is distinguished from the vow of marriage, which might be equally injurious in the case of the son, over whom the parent has received no such power: nor is there any authority under which the parent of the bride can rescind the vow of the bridegroom; but, unless the power can be extended over both parties, it is worse than nugatory; acquitting the woman of her vow, and leaving the man under obligation.

The law of ravishment has furnished[x] another plea for the right of nullity; and it has been argued, that if the father may refuse his consent to the marriage,

[u] Numb. xxx. 3—8. Gerhard, s. 61. Stebbing, p. 20. Tunstall's Vindication of the power of states to prohibit clandestine marriages under the pain of absolute nullity, p. 25, 62, 63.

[x] Exod. xxii. 16. Deut. xxii. 29. Gerhard, s. 61.

to which the ravisher is bound to submit, he may also annull the marriage contracted without his consent. But the two cases are very different: and the particular power of preventing a marriage which one party may be obliged to contract, cannot be brought to establish the power of annulling a marriage actually contracted by both parties, under circumstances totally distinct. The father of the ravisher had no power of assent or dissent.

In many texts parents are said to give their children in marriage, and to take husbands or wives for them[y]. It is unquestionably the duty of parents, to provide marriages for their children, and of children, to defer to the will of their parents: and this is the chief conclusion which can be drawn from these expressions, of which a strict interpretation might make children merely passive in the contract of marriage. In English law widows are given in marriage, when the consent of parents is not required. In the case of the commanded marriage of the brother's widow, the father was not consulted; and his power, if he possessed any, was suspended: and in any estimate of the right of parents upon Jewish precedents, attention should be paid to the early marriages of the Jews; the distinction between the espousals and the marriage; the solemnities of the dower; and the prevailing state of polygamy. The only passage of the New Testament which can be thought to confirm the parental right, is that in which the apostle, speaking of the marriage of a daughter, says, He that giveth her in marriage doeth well, but he who

[y] Gerhard, s. 60. Stebbing, p. 19.

giveth her not in marriage doeth better[z]. The text can relate to no more than the power of parents to dispose of their children in marriage; and before it can be brought to sanction a common right of nullity, it should be shewn not to be restricted to a particular time and case; and care should be taken, lest in its extreme application it is made to circumscribe the free use of marriage. It is in the same chapter that the apostle affirms the remedial benefit of marriage, of which it must be left to the discretion of the individual, whether he will or will not avail himself[a].

The authorities thus recited from the Scriptures relate entirely to the cases of parents, in making provision for the marriage of their children; or of children, in deferring to the will of their parents in respect of marriage; and exhibit no proof of the right of annulling marriages contracted without consent of parents. The marriage of Esau[b] was eminently contracted without the consent, and against the will, of his parents; but it was not therefore annulled. The writings of the fathers and the canons of councils, which have been collected by the learned industry of Gerhard and Bingham, are not more conclusive.

Tertullian, in affirming that marriage was not duly contracted without the consent of parents, expressly alludes to the Roman practice, with which he compares the conciliation of marriage by the Church, and the ratification of the heavenly Father[c].

[z] 1 Cor. vii. 38. Gerhard, s. 60. [a] 1 Cor. vii. 9. Enquiry into the force of annulling clauses, p. 11, 13, 20. [b] Gen. xxvi. 34. xxvii. 46. [c] Ad Ux. ii. s. 9.

Clemens of Alexandria mentions the case of a young woman, who being solicited concerning a lawful marriage, referred the matter to her mother[d]. The reference proved the piety of the daughter, without establishing the nullifying power of the mother, which was not admitted even in the Roman law.

Ambrose explains the apostolic injunction, of marrying in the Lord, of the duty of a daughter to leave the choice of a husband to her parents[e]. Even this extraordinary exposition is by no means conclusive of a right of nullity. The expressions of the pretended Ambrose, concerning the validity of marriages contracted out of the appointment of God, which when they are known require to be amended[f], have been also interpreted of marriages without consent. But the argument of the apostle and his commentator relate to the marriages of the faithful with the unbelieving, interdicted in both the Testaments; and it is vain to deny the continuance of this interdiction, and to ground upon the denial a right of nullity, not asserted in either Testament. Ambrose, in maintaining the alleged right, pleads for moderation in its use[g].

Basil denies the force of covenants, contracted by such as are in the power of another[h]. The rule proceeds on the assumption, that in respect of marriage one person is in the power of another. He also calls the marriages of minors stolen, or married clandestinely and without the father's consent, not matri-

[d] Strom. l. iii. [e] De Abrah. l. i. c. ult. [f] Com. in 1 Cor. vii. [g] Ep. ad Sisinn. [h] Ep. ad Amphiloch.

mony, but fornication, of no validity, but null, unless they were ratified by the consent required. If they were null they could not be confirmed: and the assertion of their nullity, from want of consent, was the mere law of the empire.

Chrysostom[i] exhorts parents to take seasonable care for the marriage of their children, that they may not fall into debauchery; adding, as a reason, that if they shall be debauched before their marriage, they will fail in matrimonial constancy. The precept teaches the duty of parents: does it bear any evidence to the right of rescinding the marriages of their children?

Augustin[k] speaks of a minor whom he could not give in marriage, even by her own consent, because she had an aunt, who ought to be consulted; and perhaps a mother, to whom nature gave the preference, before all others, in disposing of her daughter, unless she had attained the age in which she had free liberty to dispose of herself. The rule is unexceptionable, but it is inconclusive of the right of nullity, and it is inconsistent even with the Roman law.

In the Epistle ascribed to Evaristus, it is pretended to be an apostolical tradition, that there is no marriage, unless the wife be asked of those who have the dominion over her, and in whose custody she is, unless she be betrothed by her parents and relations, and lawfully endowed, and sacerdotally blessed. Parts of this pretended tradition are manifestly counterfeit, and probably not more ancient than the sixth century: the right of nullity forms no part of it;

[i] Hom. ix. in 1 Tim. [k] Ep. ccxxxii.

and it relates to the marriage of the woman, and not of the man.

There are other authorities alleged by the advocates of nullity, which it would be improper to overlook, but which are not of sufficient value to demand a distinct refutation. Thus the Pope Leo asks, What should that wife be, who is to be deemed according to the law a chaste virgin, betrothed in her virginity, lawfully endowed, and delivered by her parents to the bridegroom, and received by the paranymphs; and thus, according to the law and to the Gospel, taken by a public marriage for a wife? He also affirms, that women joined to husbands by the will of their parents are blameless. Pope Nicolas declares that nuptial contracts are formed by the consent of the contracting parties, and of the persons in whose power they are. The rule of Gregory is, that when a girl that has been ravished is restored to the power of her father, and the ravisher repents of his offence, they may marry, with the consent of the parents of both parties; and that if a woman shall be married by force, and without the will of her father, he is free to take her from her husband, and deliver her to whom he will[1].

So weak and inconclusive are the testimonies of the fathers to the right of nullity: the decrees of councils produced by Gerhard, in favour of the right in question, are clear in affirming the duty of obtaining consent; but they fail to establish the power of annulling marriages contracted without consent. Thus it was ordained in the fourth council of Car-

[1] Gerhard, s. 69.

thage: When the bride and bridegroom are to be blessed by the priest, they are to be presented by the parents or paranymphs to the priest. Again, in the third council of Toledo: Let widows marry whom they will: let the same be the condition of virgins: nor let them be constrained to marry against the will of their parents, or their own wills. So in the council of Orleans: If the girl who is ravished has a father, and she shall have consented with the ravisher, she may be delivered by the will of her father, and the ravisher is liable to make satisfaction to the father, if he be of superior condition.

There is no presumption in asserting the irrelevance of these authorities, and their incapacity of sustaining the right in question. Hotman, a very competent judge, has pronounced it to be most clear that the consent of parents is not required by the canon law, and the exceptions which have been alleged are such as confirm the opinion. That the fathers have not spoken more fully upon the subject may be accounted for by the prevalence of the Roman law at the time, under which it would have been impolitic to maintain a doctrine of which the practical consequences would have been so pernicious as the civil nullity of marriage, and which might have exposed its advocates to the frowns of the imperial law. But it is bold and gratuitous to assume[m], that the invalidity of marriages contracted without consent was held until the thirteenth century, when marriage was made matter of ecclesiastical cognizance, and the doctrine of its indissolubility

[m] Schott. ad s. 68. sqq.

was first inferred from the mystical union of Christ with his Church. This doctrine is derived from apostolical authority, and is one of the first and most continuous traditions of the Church. The validity of marriage in the time of Tertullian, if not of Ignatius also, depended on its public profession before the Church; and, notwithstanding the rigour of the ancient law of Rome, Ulpian, the contemporary of Tertullian, has affirmed, that the concord of matrimony cannot be disturbed by the paternal authority[n]. The husband had also the right of demanding his wife of a parent in whose power she was, and who detained her against her will: and hence results the axiom of equity and of law, that marriages are not lawfully contracted without consent of the persons in whose power the persons marrying are, but that being contracted they are not dissolved[o]. They may be compared with irregular wills, which, notwithstanding their informality, are nevertheless wills: and such marriages, although they are unjust in respect of the parents, may nevertheless, in respect of the parties, grow into good marriage, by their constancy in matrimony[p]. These opinions of the old civilians are alone decisive of the question of nullity; and they proceed upon the ground that the public interest prevails over the private advantage of the parent, the only reason pretended for the right of nullity. It is at the same time necessary to observe, that the advocates of nullity do not impugn the doctrine of indissolubility of marriage, but insist

[n] Brisson de Ju. Con. [o] Paulus in libr. Senten. apud Brisson. [p] Fr. Hotman de Rit. Nu. et Matr. c. 3.

on the utter invalidity of the contract itself, which in their judgment is not only voidable but void. Bingham has asserted, that he knew "no example of the Church's allowing or approving any marriage to be lawful where the consent of the parents, in disposing of their children when under age, was not had first or last to the ratification of it[q]." *First or last* is but a loose expression, more appropriate to voidability than to nullity; and it is obvious to ask, Where are the examples of such nullity, independent of the Roman law? The apocryphal history of Paul and Thecla, if it does not impugn the right of nullity, does at least prove that parents had not the power of constraining the marriage of their children.

Inconsistent with the nature of a voluntary contract, and destitute of all divine authority, the right of nullity has been argued upon the power of human legislators to refuse validity to contracts made under certain prohibited circumstances[r]. This right is however restricted to the civil effects of the marriage, without pretending to weaken the bond of marriage on the conscience, and is compared with the invalidity of other acts performed during the minority, which the minor is bound in honour, not by law, to fulfil. Although the right is thus made to depend not on any general principle, but on the arbitrary authority of the law, of law varying in different nations, still, as it allows the marriage in a certain sense, as it neither leaves the parties free to marry again, nor affects their issue with the stain of

[q] Eccl. Antiq. b. xxii. c. 2. s. 4.

[r] Puffendorf. de Off. l. vi. c. 1. s. 8. Stebbing, p. 27.

bastardy, nor renders them incapable of inheriting the property of their immediate parents, it does not call for any particular refutation. Even disinheritance, which in some countries follows the marriage without consent, is a matter perfectly within the cognizance of the law: and it is justly admitted, that although parents have no right of annulling marriages contracted without consent, the children who marry without consent can have no claim upon their parents for maintenance in the marriage contracted against their will[s].

Universal practice has been alleged in proof of the right of nullity: and it is asserted with some ambiguity that the necessity of the consent of parents in the marriage of their children is found not only in the Roman law, but in the practice of almost all nations, evinced in their poetry, their history, and their laws[t]. If this necessity is interpreted of the right of nullity, very considerable differences will be found in the practice of different nations, and in many, which have not admitted the principles of Roman jurisprudence, the evidence will be found very defective.

There is no trace of nullity in the Grecian mythology: the fable of Apuleius[u], concerning the clandestine marriage of Cupid and Psyche, is evidently constructed on the rules of Roman law, and may be pleaded against the validity of other marriages than those contracted without consent of parents. The Athenian laws collected by Potter[x] related only to

[s] Enquiry into the Annulling Clauses, p. 10. [t] Gerhard, s. 64. [u] De Asino Aureo, l. vi. Bingham. [x] Antiq. b. i. c. 26.

the marriage of the heiress, which was to be contracted by the father, brother on the father's side, or grandfather; on the death of these relations she was to marry whom the law should appoint: the woman of low condition might marry at her own discretion. The heiress was also, as in the Jewish law, obliged to marry her nearest relation; and the next of kin was bound to marry or give a portion to the orphan who had no inheritance. These were certain restrictions on the parental authority: but it is said, that virgins might not marry without consent of their fathers, or mothers, or brothers, grandfathers, or guardians; and that men were not permitted to marry without consulting their parents[y]. There is no difficulty in conceding this extent of parental right and filial duty, as the concession does not involve the right of nullity, which cannot be deduced from the cases alleged by various writers in its support. Achilles, in refusing the offer of Agamemnon's daughter, leaves his marriage to his father:

Πηλευς θην μοι επειτα γυναικα γαμεσσεται αυτος.

Does this sentence justify the right of nullity? May it not rather be argued, that the offer of Agamemnon proceeds on the supposition that Achilles was competent to accept or refuse the offer, which he actually declined without consulting his father; that he proposed on his return to choose for himself from the daughters of Greece;

ταων ἡν κ' εθελοιμι, φιλην ποιησομ' ακοιτιν'[z]

[y] Antiq. b. iv. c. 11. [z] Iliad, i. 394, 397.

and that he eventually solicited and obtained Polyxena. Hermione in Euripides[a] refers her espousals to the care of her parents; and, before her conduct is made to sanction more than the parent's right in disposing of a daughter, it should be remembered, that she is at that very instant objecting to her parent's choice, praying for a deliverance from its effects, and actually concerting with Orestes the means of escape. Menelaus himself, according to Euripides, had contracted her to Orestes, and changed his purpose in favour of Pyrrhus, but he eventually gave her to Orestes, who received her:

και λεκτρ' επηνεσ' ηνικ' αν διδφ πατηρ·

and even this line has been recited in favour of the parent's right; although, according to the Roman representation of Ovid[b], she was contracted not by her father, but by her grandfather. Hero, according to Musæus[c], objects to the suit of Leander that they could not be publicly married because it was against the will of her parents; but they nevertheless agreed to a private marriage, which, though it wanted the customary rites, was nevertheless called a marriage, and it was certainly not annulled for the want of consent. The story of Jason and Medea[d] is another instance of a similar marriage. When Cyaxares offered to Cyrus[e] his daughter in marriage, with the kingdom of Media for a portion, he presumed on the competence of Cyrus to accept the offer, and

[a] Andr. v. 988, 999. Compare Iphig. in Taurid. v. 365. [b] Heroid. Ep. viii. [c] Vers. 179, 221, 274—282. [d] Pind. Pyth. Carm. iv. v. 395. [e] Xen. Cyrop. l. viii. c. 5.

Cyrus proved no more than his own piety in wishing to marry with the consent of his father and mother. Terence[f] is also cited in testimony of the necessity of consent, but fails to prove, that the want of consent annulls the marriage, of which there is no evidence in comedies formed upon Grecian manners, and exhibiting the complaints of old men, offended by the marriage of their sons, which they do not attempt to nullify, and which are in fact confirmed. Plautus, Gellius, and Stobæus[g], whose authorities have been recited, affirm the power of parents to prescribe marriage to their children, and the duty of children to defer to that power, and they affirm no more. Plautus and Gellius are merely Roman authorities; and nothing but the necessity of a desperate cause could have induced a reference to Catullus.

In the many constitutions of the Roman law it would be easy to make distinctions between filial duty and paternal authority, between the interdictions of marriage, the right of nullity, and the various modifications of that right; but the evidences of absolute power are too clear to be disputed in a law which, more than any other, sanctions the arbitrary excesses of paternal tyranny, and in which the cha-

[f] Andr. act v. sc. 3. The offence of Pamphilus consisted in marrying not only against his father's will, but in marrying a foreigner, as was supposed, and on proof of her Attic descent, a reconciliation took place. Phorm. act ii. sc. 1. The father ceases to plead his *imperium*, and acknowledges the authority of the law.

[g] Plaut. in Stich. A. Gell. Noct. Att. l. ii. c. 7. Naumach. apud Stobæum, Serm. lxxiv. apud Gerhard.

racter of master and of slave, of owner and of thing[h], are written in characters of blood, which cannot be obliterated by the tears of the millions whose necks have been bent beneath its pernicious sway. The right of annulling marriage was authorized by the Roman law in its fullest extent, and the abuses of its application will offer the best antidote to its adoption. There is still extant a law of Numa Pompilius[i], ordaining, that if a father shall permit a son to marry a wife, partaker of his sacrifices and goods according to the law, he shall not afterwards have power of selling that son: and hence Gerhard[k] infers, that from the beginning of the republic the authority of the father was required in the marriage of the children. Under the unbounded licence[l] of

[h] Millar's Origin of Ranks, p. 125. "In one respect the power of a father over his sons appears in ancient Rome to have extended even farther than that of a master over his slaves. If upon any occasion a son had been sold by his father, and had afterwards obtained his freedom from the purchaser, he did not thereby become independent, but was again reduced under the paternal dominion. The same consequences ensued if he had been sold and manumitted a second time: and it was only after a third purchase that the power of the father was altogether dissolved."

[i] Dionys. Halicar. apud Gerhard.

[k] Sect. 65.

[l] The intensity of horror which the following narrative is calculated to excite will not prevent the reader from observing the practical application of the Roman rigour of paternal authority in the public law of the Mahometan, and the private practice of the Hindoo. The anecdote is the more relevant, as it is founded on a case of disapproved and degrading marriage. "A young Hindoo girl of superior beauty had by chance been seen and admired by a youth of the same religion, but inferior caste. Knowing the latter to be an insurmountable barrier to the

the paternal authority maintained in the Roman law the marriage of the children depended entirely upon the father's power, and not only was his consent required to confirm the marriage, but he might prescribe a marriage to his children of his own authority, and without consulting their will, or obtaining their consent. Such indeed was his power, that it was at his option whether he would command a marriage to his children, with which they might not

parent's consent, he at length prevailed on her to elope with him, and marry him in his own village. Her family soon discovered their retreat, and contrived by stratagem to get her again into their power. Accordingly her mother was dispatched to negociate the pretended reconciliation, and to prevail on her to return, in order that the marriage might be properly celebrated at her father's house. The poor girl, delighted at the prospect of so fortunate an issue, readily accompanied her mother, and was received by her father and brother with open arms. When three days had elapsed, and no marriage feast been proclaimed, she began to suspect the treachery, and determined on seizing the first opportunity of returning to the husband whom she had chosen. A favourable one seemed to present itself, but she had not been gone long, before she was overtáken by her brother, who affected to sympathize with her, and offered to see her safe home. The road lay through an unfrequented path, which taking advantage of he drew his sword, and severed her head from the body. She was found the next morning weltering in her blood. The father and brother were immediately apprehended, and not only confessed the crime, but exulted in the accomplishment of it: nor was it in the power of the judge to punish them; for unhappily the Mahometan law, by which natives of every description are tried, is so arbitrary as to invest parents with unlimited authority over their children, even to the depriving them of life; and it being proved in evidence that the son only obeyed his father's orders, they were both acquitted." Tour through the Upper Provinces of Hindostan, p. 67.

refuse to comply, or regulate their marriage by his consent: he might not only dictate the marriage without their consent, but he might also dissolve it without their concurrence. The power appears incredible, but it is attested beyond dispute; and it was adapted to a peculiar state of society, in which the father claimed a right of property in the children, in which before their emancipation they were at his absolute disposal, and formed a common household, in which it was but natural that a son's wife should not participate without his father's consent, and which was so regulated as to leave it doubtful whether the father or the grandfather had the more power over the son's children in respect of marriage, and that the daughter could not leave her service without permission of her master. The only mitigation of this state of the Roman child was, that, after the decease of his father, or his own emancipation, the son was at liberty to divorce the wife who had been imposed upon him, and to prove his own liberty by playing the tyrant to his wife. The rigour of these laws could not be sustained, and they were reformed by the emperors, who required the consent of parents, but abolished their power of prescribing marriages to their children, and of annulling those which had been contracted without their consent. It was thus ordained by Diocletian and Marcian, that the son should not be constrained to marry: if it was his desire, and he observed the injunctions of the law, he should not be prevented from marrying whom he would, upon condition that his father consented to the marriage. The law was more partially rescinded in favour of the woman, who was still left

in subjection to the arbitrary will of her father, with the only exceptions, that he might not compel her to marry an unworthy, a base, or an infamous man; or to detain her against her will from the demands of her husband[m].

There was a rigour in the law of Constantine against ravishers, which merited the character given to it by his son, that it was full of such atrocious judgment as would defeat itself.

"If any one, without first obtaining the consent of parents, steal a virgin against her will, or carry her off by her own consent, hoping that her consent will protect him, he shall have no benefit from such consent, as the ancient laws have determined; but the virgin herself shall be held guilty, as partaker of his crime. If any nurse be accessary, her detestable service shall be revenged by pouring molten lead into her mouth. If the virgin be detected to have given her consent, she shall be punished with the same severity as the raptor himself, seeing she that is stolen away against her will is not suffered to go unpunished, because she might have kept herself at home; or if she was taken by violence out of her father's house, she should have cried out for help to the neighbourhood, and used all means possible to defend herself. But on such we impose only a slighter punishment; denying them the right of succeeding to their father's inheritance. But the raptor himself, being clearly convicted, shall have no benefit of appeal. If parents, who are chiefly concerned to prosecute this crime, connive at it, they shall be

[m] Schott. ad s. 65, 66. Brisson, Hotman, ubi supra.

banished. All who are assistants to the raptor shall be liable to the same punishment, without distinction of sex; and if any such be slaves, they shall be burned alive[n]."

This cruel and inhuman edict relates less to marriages contracted without consent than to the abduction of virgins; it does not annull the marriage, but by the death of the raptor; and there is a marked atrocity in its inflictions, from which the Christian and the man must always recoil with horror and disgust. Constans, in confirming the law of his father, mitigated its severity, except in the punishment of slaves. Justinian also admitted into his code some of the laws of the heathen emperors, Severus and Caracalla, upon this subject.

In these imperial laws, the marriage of the slave without consent of his master, was put on the same footing with the marriage of the child without consent of his father. These were equal usurpations, proceeding on the same assumed right of the power of the master over the thing; and the excesses of the one may be of use in restraining the excesses of the other[o].

When it is said of the code of Roman laws, with an exaggeration of eulogy which might be mistaken for irony and sarcasm, that they are so known, that no man can be ignorant of them, so clear that they cannot be obscured, so holy that they cannot be abolished[p], it is forgotten that this system of jurisprudence proceeds in entire contempt of the principle,

[n] Bingham, Antiq. b. xvi. c. 9. s. 2. [o] See Robertson's Charles V. vol. i. note ix. See above, p. 264. [p] Beza de Repudiis.

that "the interest of those who are governed is the chief circumstance which ought to regulate the powers committed to a father, as well as those committed to a civil magistrate; and whenever the prerogative of either is further extended than is requisite for this great end, it immediately degenerates into usurpation, and is to be regarded as a violation of the natural rights of mankind[q]." This was the manifest fault of the Roman law, the true and only source of the power of nullifying marriages contracted without consent. When it was thought necessary to defend this power, it was argued upon authorities as irrelevant, as the exceptions to the practice were unavoidable.

The marked difference between the ecclesiastical and the civil laws, at the time of the Reformation, rendered it impossible to avoid the question of nullity of marriages without consent. The question was brought before the council of Trent, upon occasion of an argument upon secret marriages, which it was proposed to avoid, together with all public marriages contracted without consent. The latter measure was argued upon the inconvenience of the contract of inexperienced youth; upon the divine law, commanding obedience to parents, and giving to them authority to dispose of their daughters in marriage; upon the precedent of the interference of the father in the marriages of the patriarchs; and upon the authority of the imperial and other laws, in invalidating marriages contracted without consent. On these grounds, and with a view of preventing by

[q] Millar's Origin of Ranks, p. 138.

a penalty of nullity what a mere prohibition could not prevent, it was proposed to nullify such marriages, on the authority of the Church. When the proposition was pressed by the French fathers, it was argued in reply, that such a measure would give power to laymen over the sacraments; that it was contrary to the Scriptures, which permitted, a man to leave his father and mother; and that nothing could be more inconvenient, than to refer children to their fathers in matters of conscience, or more perplexing, than the case of a father refusing to consent to the marriage of a son who did not possess the gift of continence. Of twenty-nine fathers who spoke on this question in the congregation, twenty proposed to omit it, and the others approved the decree generally, or restricted it to sons of the age of twenty, and daughters of the age of eighteen. The French and Spanish prelates were all agreed on the invalidity of secret marriages: and on a general understanding that it was a matter which related to reformation and not to doctrine, after many revisions of the decree, and with the addition of new precautions for preventing clandestinity and enforcing the presence of the priest, it was at length resolved: "Although there is no doubt that clandestine marriages, celebrated with the free consent of the contracting parties, are valid and true, so long as the Church does not make them void; and therefore they are justly to be condemned, as this holy synod with an anathema condemns them, who deny that these are true and valid marriages; and who falsely affirm that marriages contracted by children, without consent of their parents, are void; and that the parents may affirm

or void them; the Church has nevertheless, for the justest reasons, detested and prohibited them[r]."

The Church of France has always dissented from this decision of the council of Trent, and contended for the right of annulling marriages contracted without consent. The principal Reformers, with their contemporaries and successors, were free in the expression of their opinions, whether in opposition to the rule of the Romish Church, or in maintenance of the principle of the civil law. Luther and Melancthon observed a discriminating moderation, affirming, that if the marriage without consent was followed by birth of issue, it ought to be confirmed and ratified; otherwise it was in the power of parents, whether it should be annulled or ratified. Calvin was more decided in the complaint that the Romanists "made lawes, whereby they stablished their tyrannie, but these partly manifestly wicked against God, and partly most unjust towards men, as are these, that marriages made by young persons, without consent of their parents, should remaine of force and stablished[s]." Bucer desired the revival of the provision of the civil law, under which marriages without consent of the father or grandfather should not be ratified. Brentius and Chemnitius held, that if marriage was celebrated without consent of parents, it should be referred to the magistrate, by whose judgment it should be confirmed or annulled. Beza, who acknowledges no validity in marriage without a divine concurrence, claims a divine au-

[r] Sess. xxiv. De Reform. Matr. c. 1. Hist. of the Council of Trent. [s] Inst. b. iv. c. 19. s. 37.

thority for the right of nullity, which he attempts to establish on texts of Scripture; but when he is pressed with the case of a father giving sanction to a marriage, to which he had previously refused his consent, he is forced to the littleness of arguing, that the heavenly Father changes with the earthly father, and authorizes a marriage which otherwise had been invalid[t]. Erasmus, who has the reputation of agitating the question, affirms, that the doctrine of the validity of marriage contracted without the knowledge or the will of the parents, cannot be proved by the sense of nature, nor by ancient laws, nor by Moses, nor by the evangelical or apostolical doctrine. Grotius denies that the consent of parents is naturally requisite to the validity of marriage; affirming that the arguments for this position are inconclusive, but that it is the duty of children to obtain their consent; which he maintains, on the condition that the will of the parents is not unjust. But he denies the inference that children are therefore incapable of contracting marriage, and that the duty of filial reverence is such as to annull the marriage contracted by an act of filial disobedience[u].

The opinion of most of these eminent men is but temperately and with various modifications opposed to the decision of the council of Trent, and to the previous practice of the Church. In England the opposition was not more decisive or distinct, although, from the previous use of the papal Church, and the administration of marriage as a sacrament,

[t] Beza de Repudiis. [u] Gerhard, s. 82, 83. Stebbing, p. 8—17.

there was a necessity for a more explicit declaration than is found in the public acts of the age. The statute 32 Henry VIII. c. 38. entitled, An Act for marriages to stand notwithstanding precontracts, provides that all "such marriages as within the Church of England shall be contracted between lawful persons, as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry, such marriages being contract and solemnized in the face of the Church, and consummate with bodily knowledge or fruit of children or child, shall be judged and taken to be lawful, good, just, and indissoluble, notwithstanding any precontract; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." Throughout the statute "God's law" is made the sole rule and criterion of lawful matrimony; there is no impeachment of any marriage without the Levitical degrees, which certainly do not include the right of nullity; there is no reservation or exception in favour of that right; no contravention of the Romish doctrine on the subject; but a continual complaint of the abuse of dispensations of marriage, which are perfectly distinct from marriages without consent. In the preamble it is said of marriages void by reason of precontract, "that marriages have been brought into such uncertainty thereby, that no marriage could be so surely knit and bounden, but it should lie in either of the parties' power and arbiter, casting away the fear of God by means and compasses, to prove a precontract, a kindred and alliance, or a carnal knowledge to defeat the same; and so, under pretence of these

allegations afore rehearsed, to live all the days of their lives in detestable adultery, to the utter destruction of their own souls, and the provocation of the terrible wrath of God upon the places where such abominations are used and suffered." The want of consent is not rehearsed among the means and compasses of defeating marriage, and leading to detestable adultery, in the sense of a second marriage upon the unjust avoidance of the first.

The Act underwent various modifications in the succeeding reigns, being partially repealed, as respected precontracts, by 3 Edw. VI. c. 23.[x] entirely repealed by 1 and 2 Philip and Mary, and again partially restored by 1 Eliz. c. i. s. 12. but in none of these modifications was any allusion made to the nullity of marriages contracted without consent of parents. It is, however, just to argue, that as the doctrine of precontracts, held under the papal do-

[x] The reasons assigned for this repeal exhibit a curious view of the humour of the age: "Sithence the time of which Act, although the same was godly meant, the unruliness of men hath ungodly abused the same, and divers inconveniences, intolerable to Christian ears and eyes, followed thereupon; women and men breaking their own promises and faiths made by the one unto the other, so set upon sensuality and pleasure, that if after the contract of matrimony they might have whom they more favoured and desired, they might be content, by lightness of their nature, to overturn all that they had done afore, and not afraid in manner even from the very church door and marriage-feast, the man to take another spouse, and the espouse to take another husband; more for bodily lust and carnal knowledge than for surety of faith and truth, or having God in their good remembrance, contemning many times also the commandment of the ecclesiastical judge, forbidding the parties having made the contract to do any thing in prejudice to the same: Be it therefore," &c.

minion, was reestablished by Mary; so if the right of nullity in respect of marriages without consent had been asserted by her protestant predecessors, it would probably have been rescinded by the zeal of Mary. The doctrine of Rome was indirectly confirmed by the silence of the legislature, and especially as its attention was drawn to the marriage of minors without consent, which was restrained by other penalties.

The sentiments of Edward's counsellors may be collected from the form of Solemnization of Matrimony, which appeared in his first and second books, in which there is evident allusion to the statute of his father, both in respect of the celebration of marriage in the face of the Church or congregation, and in the warning addressed to the parties, that so many as bee coupled together otherwise than God's worde doeth alowe, are not joined by God, neither is their matrimonie lawful; which is most obviously interpreted of marriages within the Levitical degrees. If the compilers of the protestant liturgy had intended to oppose the Tridentine doctrine of the validity of marriage contracted without consent of parents, they would have been more scrupulous in copying from the missals already in use[y]; they would have made some variation in the form of receiving the bride from her father or friend, in the triple publication of banns, and the other rubrics in respect of the form of solemnization prescribed by the council of Trent, in the very chapter which ordains the validity of marriages without consent: they would

[y] See Appendix, No. III.

hardly have retained the form of mutual contract, with little variation besides the omission of the hypothetical consent of the Church, or have imagined that the same words which bound a Romanist independently of the parents' consent, should only bind a protestant upon condition of that assent: and if they had contemplated any nullity of marriage, they would not have insisted upon the typical unity of Christ with his Church, which later writers have supposed to be the chief argument of the Romanist for the indissolubility of marriage. They differed, and they avowed their difference from the Church of Rome, on the sacramental nature of marriage; and had they differed upon other points, they would have declared their difference with the same freedom, and with a perspicuity which could neither be mistaken nor misunderstood. The absence not only of express declaration, but of the faintest allusion to nullity under such circumstances, affords the clearest proof that the doctrine was not agreeable to the English Reformers.

A strong objection will nevertheless be collected from a clause in the Reformatio Legum, which directly asserts the nullity of marriage without consent; affirming, that "since it is agreeable to Scripture, to piety, and to justice, that such marriages should be condemned and held to be null, as are contracted by children without the knowledge or consent of their parents or guardians; they are therefore forbidden to marry without the authority of the persons in whose power they are; and if they do marry, their marriages are held to be null. But if parents or guardians are slow in providing marriages,

or too rigorous in the terms which they propose, an appeal may be made to the ecclesiastical judge, who may assume their office upon such emergency, and administer the whole business with equity[z]." There had been no occasion for this suggestion, if the nullity of marriage had been previously known to the English law: and it is a forcible proof of its inconsistency with the spirit of that law, that the proposition was not acted upon. The suggestion may have originated with other members of the commission for reviewing the ecclesiastical laws, than those to whom the English Church is chiefly indebted; and it would not be unjust to ascribe it to a foreign civilian, modifying the principles of Roman jurisprudence, and abridging the authority of the parent in the same degree that it contracts the liberty of the child. It is remarkable, that the ollowing section defines the age in which marriage may be concluded; allowing the woman at twelve years of age, and the man at fourteen, to take a consort; but not permitting any persons under this age to be partakers of marriage. Was it meant, that at that age they were free to contract marriage for themselves?

It is certain that this was the law, till it was restricted by the statute 4 and 5 Philip and Mary, in which mention is expressly made of marriages without consent, and their prevalence is ascribed to the lack of wholesome laws for the redress thereof. The Act is entituled, An Act for the punishment of such as shall take away any maidens that be inheritors,

[z] Ref. Legg. Eccl. de Matr. c. 4.

being within the age of sixteen years, or that marry them without consent of their parents.

The preamble of this Act, which was the first to make the marriage of minors without consent a legal offence[a], recites in substance that women children, as well heirs apparent as others having left unto them hereditaments or goods moveable, to advance them in marriage according to their degrees, and for surety and comfort, as well for themselves as for their friends and kinsfolk, by flattery, trifling gifts, and fair promises, of many unthrifty and light personages, are secretly allured to contract matrimony with the said unthrifty and light personages; and thereupon, either with sleight or force, oftentimes be taken away from their parents, friends, or kinsfolk, to the high displeasure of Almighty God, disparagement of the said children, and the extreme continual grief of their friends: Which ungodly dealing, for lack of wholsome lawes to the redress thereof, remaineth a great, familiar, and common mischief in this Commonwealth. After declaring it unlawful to take away any maid under the age of sixteen years without the will of the father or guardians, and making the offender liable to imprisonment for two years and to fine in the Star-chamber, it proceeds to enact, That if any person shall take away, or cause to be taken away, or shall, against the will, or unknowing of the father, (if he be in life, or the mother having

[a] The Act 3 Hen. VII. c. 2. had made it felony to take away or be concerned in taking away women, as well maidens as widows, and wives having substances, some in goods moveable and some in lands and tenements, and some being heirs apparent unto their ancestors.

the custody of such child if the father be dead,) contract matrimony with any such woman child, except by the consent of such person or persons as shall have the care of such woman child, that then every person so offending shall suffer imprisonment by the space of five years, or else shall pay such fine as shall be assessed in the Star-chamber. It was further enacted, that if any woman child, being above the age of twelve years and under the age of sixteen years, do at any time consent to such person that shall so make any contract of matrimony contrary to the effect of this statute, that then the next of the kin of the same woman child, to whom the inheritance should descend after the decease of the same woman child, shall from the time of such agreement hold and enjoy all such hereditaments as the same woman child had in possession, reversion, or remainder, at the time of such consent, during the life of such person so contracting matrimony; and after the decease of such person, the said hereditaments shall descend to such persons as they should have done in case this Act had not been made, other than to him only that shall so contract matrimony.

The last clause of this Act, which is the basis of the present law of the marriage of minors without consent, is of the highest importance in proving the very reverse of the doctrine of nullity; that although the parties contracting matrimony without consent transgress the statute, and are liable to penalties, they nevertheless do contract matrimony, and the property of the heiress temporarily forfeited does eventually revert to her and her heirs. The operation of the statute is singularly restricted to the

heiress: it offers no protection to the heir, or the person without inheritance.

Archbishop Parker's Tables inhibit marriage without consent, but do not assert its nullity, which, as in the canons of 1603[b], is expressly attached to marriages within the prohibited degrees, but not to marriages without consent of parents. The former are prohibited and declared to be null, the latter are simply prohibited. The distinction is so obvious as to render all comment unnecessary. With the hundredth canon it is however proper to compare the sixty-

[b] Canon 99. No person shall marry within the degrees prohibited by the laws of God. . . . And all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated.

Canon 100. No children under the age of one and twenty years complete shall contract themselves or marry without consent of their parents, or of their guardians and governors if their parents be deceased.

Canon 62. No minister, upon pain of suspension *per triennium ipso facto*, shall celebrate matrimony between any persons without a faculty or licence . . . except the banns of matrimony have been first published three several Sundays or holidays in the time of divine service in the parish churches or chapels where the said parties dwell, according to the Book of Common Prayer. Neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unseasonable time, but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the said churches or chapels where one of them dwelleth, and likewise in time of divine service: nor when banns are thrice asked, and no licence in that respect necessary, before the parents or governors of the parties to be married being under the age of twenty-one years shall either personally or by sufficient testimony signify their consents.

second canon, which makes the most efficient provision for the prevention of clandestinity, by forbidding, under pain of suspension for three years, the celebration of any marriage without licence or banns; by requiring its celebration in the time of divine service, within certain hours of the day, and in the place where one of the parties shall reside; and by demanding a notification of the consent of parents to the marriage of minors. Every possible precaution was thus taken to give publicity to the marriage, and to secure the rights and interests of the parents, which could only be defeated by a fraudulent concealment of the minority.

"The drift of the canon without doubt is this; that as there are certain annulling impediments, as those of precontracts, consanguinity, and affinity, which make the marriage void, and for the timely discovery of which, if any such lie in the way, all imaginable care is taken both by publication of banns and by securities required at the granting of licences; so there are certain conditions to be observed in all marriages, which, though not so absolutely necessary as that the marriage shall be void without them, are yet so requisite to the due solemnization of it, that it cannot be celebrated legitimately and canonically without them[c]."

This was the language of Archdeacon Sharpe, delivered in an express comment on the canon in the year 1748, only six years before the introduction of Lord Hardwicke's Bill; and it shews, that at that period the consent of parents was not so necessary

[c] Sharpe's Visitation Charges, p. 275.

that marriage was void without it. In the intermediate period, and especially at the end of the seventeenth and beginning of the eighteenth centuries, many remedial measures for the enforcement of the canon were enacted or proposed.

The statutes which were actually passed (6 and 7 Will. III. c. 6, 7, and 8 Will. III. c. 35.[d] 10 Anne, c. 19.) are chiefly valuable in proving the entire neglect of every canonical precaution in respect of banns, licence, and place of marriage, which they endeavoured to regulate by pecuniary penalties, viz. of £100 (with suspension for three years for the second offence) upon every clergyman who should marry, or suffer another to marry, any persons in his church without banns or licence; of £10 on any person so married; of £5 upon every sexton or parish clerk assisting at such marriage; and of £100 upon any gaoler who should permit marriage to be solemnized in his prison before publication of banns

[d] The preamble of the Act contains a painful record of the conduct and condition of the clergy at the time, complaining that the former Act had been "eluded and made of none effect by several parsons, vicars, and curates, who, to avoid the said penalty of £100, do substitute and permit divers other ministers to marry great numbers of persons in their respective churches or chapels, without publication of banns or licence of marriage, many of which ministers so substituted have no benefices or settled habitations, and are poor and indigent, and cannot easily be discovered . . . and whereas divers ministers being in prison for debt, or otherwise, do marry in the said prisons many persons resorting thither for the purposes aforesaid, and in other places, for lucre or gain to themselves; by all which means the duties upon licences of marriage are greatly diminished, and many other great inconveniences do arise."

or licence obtained. These Acts, which commonly bear the name of Marriage Acts, are chiefly grounded on the injury sustained by the revenue, and directed to its preservation or improvement. Other measures were contemplated for the prevention of the prevailing clandestinity.

In the year 1677 Dr. Lloyd and Dr. Eaton, two eminent civilians of the day, were summoned to attend a committee of the House of Lords, to consider of an Act to prevent clandestine marriages[e]: and again, "in the year 1690 or 1691, a Bill was brought into the House of Lords against clandestine marriages, the purport of which was to make it felony in the minister who should solemnize or offi-

[e] Speech of Doctor Phillimore on the Marriage Act, p. 4. It is reported (Times, June 19, 1822.) that "the subject was referred to a very large Committee, consisting of eight peers and all the prelates, who were instructed to provide suitable penalties for clergymen who should act in defiance of the law, to examine witnesses, and report the substance of their enquiries to the House. After the fullest consideration both by the Committee and the House it was enacted, (proposed,) that no marriage between minors should be binding, that was celebrated without the consent of parents or of guardians." Whatever may be the truth of this report, the measure did not pass the House of Commons; and the limitation of the nullity contemplated at this period may be inferred from a passage of Bishop Stillingfleet, that "matrimony being a contract of a civil and public nature, it is very just and fitting that the civil society and the Christian Church should appoint rules and orders for the decent performance of it, and may appoint penalties to the breakers of those rules, so far as to illegitimate the children born of such marriage, which is *nulling* the contract as to the *civil* effect of it. But I do not see how either Church or State can null the contract, as to conscience, so as to make it lawful for such persons to marry others." Miscell. Disc. p. 73. See Stebbing's Disc. p. 49.

ciate at such marriage. But after debate it was dropped, and chiefly upon these suggestions; that better laws could not be contrived than those already made to prevent clandestine marriages: and were our ecclesiastical constitutions duly observed and vigorously prosecuted against all who violate them, there would be no need of making Acts of Parliament, or establishing sanguinary laws against the clergy, for preventing them. That most of the stolen marriages that are complained of are brought about by the dispensation of publication of banns, which was the original law to prevent clandestine doings: the rules laid down in the canons of 1603 for granting these dispensations not being strictly observed as they ought to be[f]."

At this period occurred a transaction which excited considerable attention. Captain Campbell, brother of the Duke of Argyle, succeeded in carrying off the daughter of Sir George Wharton, an heiress of large fortune, and marrying her against her will. A royal proclamation was immediately issued for the apprehension of the offenders, and Sir John Johnstone, one of the accomplices, was tried, condemned, and executed, notwithstanding the powerful interest which was exerted in his favour, and the plea that the violence offered to the bride was less than was alleged. It was thought that this incident would have favoured the progress of a Bill then before the House of Commons for the prevention of clandestine marriages, which however dropped. Another Bill however passed both Houses

[f] Sharpe's Charges, p. 287. note.

for rendering void the marriage between Mr. Campbell and Miss Wharton, which could not have been necessary if the law of the age had recognized the nullity of marriages contracted without consent. In 1712, and again in 1718, the Convocation took up the subject of licences of matrimony, and the reformation of sundry and grievous abuses in the granting and obtaining of such licences: and the drift of their resolutions in both cases was to approve and enforce the provisions of the sixty-second canon of 1603[g].

Hitherto the English law has been shewn to be free from the imputation of nullity, and when at length it was introduced, its novelty was affirmed by Blackstone, who observed, with reference to the practice of other countries, that "it has lately been thought proper to introduce something of the same policy into our laws . . . much may be, and much has been, said, both for and against this innovation upon our ancient laws and constitution[h]."

There is no doubt, that at this time the law of marriage imperatively called for revision and renovation, from the entire neglect of every precaution and restraint which had been provided against clandestinity, and from the extraordinary facilities[i] which

[g] Ibid. p. 288, 289. Previous to the Marriage Act, licences might be obtained by letter only, stating the assent of both the parties concerned to the union, and the attestation of a witness to the signature. Gent. Mag. vol. xciii. p. 522.

[h] 1 Bl. Com. c. 15.

[i] The nature of the singular privilege attached to the Fleet Prison of celebrating what were termed Fleet marriages, is exhibited in the complaint of a correspondent of the Gentleman's Magazine for 1735, who deplores "the many ruinous marriages

were offered for entering into private and irregular marriages, to the irretrievable injury of the most respectable members of society.

The history of the Act of 1754 is given by Lord Orford with his characteristic flippancy, and in the full spirit of that implacable hostility which he bore to the Lord Chancellor Hardwicke.

"The session of Parliament was languishing towards a conclusion, when a Bill, sent down from the Lords to the Commons, which had passed almost without notice through the former House, having been carried by an hundred lords against the Duke of Bedford and eleven others, raised, or gave occasion to raise, extraordinary heats. . . .

"The Bill had been originally moved by my Lord Bath, who, attending a Scotch cause, was

that are every year performed in the Fleet, by a set of drunken, swearing parsons, with their myrmidons that wear black coats, and pretend to be clerks and registers to the Fleet, plying about Ludgate Hill, pulling and forcing people to some peddling alehouse or brandy-shop to be married, and even on Sundays stopping them as they go into the church." 2954 marriages, as was shewn in evidence, were celebrated in this way from Oct. 1704 to Feb. 1705, without either licence or certificate of banns. Twenty or thirty couple were sometimes joined in one day, and their names, if they chose to pay for it, were concealed by private marks. Pennant says, that in walking by the prison in his youth, he had been often tempted with the question, Sir, will you please to walk in and be married? and that signs exhibiting a male and female hand conjoined, with the inscription, "Marriages performed within," were common along the whole of this lawless space. A dirty fellow invited the passenger in. The parson was seen walking before the shop, a squalid, profligate figure, clad in a tattered plaid night gown, with a fiery face, ready to couple you for a dram of gin or a roll of tobacco.

struck with the hardship of a matrimonial case, in which a man, after a marriage of thirty years, was claimed by another woman on a precontract. The Judges were ordered to frame a Bill that should remedy so cruel a retrospect. They did; but drew it so ill, and it was three times printed so inaccurately, that the Chancellor was obliged to give it ample correction. Whether from mere partiality to an ordinance thus become his own, or whether in shaping a law new views of power opened to a mind fond of dictating, so it was that the Chancellor gave all his attention to a statute into which he had breathed the very spirit of aristocracy and insolent nobility. It was amazing in a country where liberty gives choice, where trade and money confer equality, and where facility of marriage has always been supposed to produce populousness; it was amazing to see a law promulged, that cramped inclination, that discountenanced matrimony, and that seemed to annex as sacred privileges to birth as could be devised in the proudest, poorest, little Italian principality. . . .

"The abuse of precontracts had occasioned the demand of a remedy: the physician immediately prescribed medicines for every ailment to which the ceremony of marriage was, or was supposed to be, liable. Publication of banns was already an established ordinance, but totally in disuse, except among the inferior people, who did not blush to obey the law. Persons of quality, who proclaimed every other step of their conjugation by the most public parade, were ashamed to have the intention of it notified, and were constantly married by special licence. Unsuitable matches in a country where

the passions are not impetuous, and where it is neither customary nor easy to tyrannize the inclinations of children, were by no means frequent; the most disproportionate alliances, those contracted by age, by dowagers, were without the scope of this Bill: yet the new Act set out with a falsehood, declaiming against clandestine marriages as if they had been a frequent evil. The greatest abuse were the temporary weddings clapped up in the Fleet, and by one Keith, who had constructed a very bishopric for revenue in May Fair, by performing that charitable office for a trifling sum." . . .

The Bill was opposed on the ground "of its impropriety in a commercial nation, and the ill-nature and partiality of its restrictions;" and as a Bill in which "new shackles were to be forged to keep young men of abilities from mounting to a level with their elder brothers." Long debates ensued "on the clause for annulling marriages that should be contracted contrary to the inhibitions in the Bill:" and some of the principal speakers are said to have "laid open the jargon and chicanery of the lawyers, and the arbitrary manner of enforcing the Bill." A long and angry debate ensued upon the clause, "that gave (very novel and) unheard of power in the first instance to parents and guardians, and then to the chancery, on the marriage of minors," in which it was maintained, "that from the beginning to the end of the Bill one only view had predominated, that of pride and aristocracy." The Bill however eventually passed the House of Commons by a majority of 125 to 56, and when it was returned to the House of Lords, it was accepted as

a Bill which was "too good to be lost, and might have much good engrafted on it hereafter[k]."

The virtue of the Bill was contained in the provisions for enforcing the publication of banns; for making the consent of parents or guardians necessary to the attainment of a licence for the marriage of minors; for abolishing the obligation of precontracts; and for securing the registration of marriages. If the Bill had contained no other provisions, it had been innocent of all evil, it could not have failed of producing essential good. These however were in the issue but the subsidiary and subordinate details of a measure which in its amended form pronounced a sentence of absolute and irretrievable nullity upon all marriages celebrated under an improper publication of banns, or under the authority of a licence obtained surreptitiously and without the requisite consent, and rendered them unmeaning forms, by which no relation was contracted and no obligation incurred.

Such nullity ought to rest not on the arbitrary rule of a single statute, opposed to the whole tenour of national law, but on principles universal and immutable: and yet, as was contended at the time, and as has been argued in these pages, the assumed right of nullity rests on no solid foundation of divine law delivered in the Scriptures, or of natural law adapted to the condition and constitution of mankind, and cannot be collected from the variableness of national laws, or from the imaginary compact which is the supposed basis of civil society, or from

[k] Lord Orford's Memoirs, vol. i. p. 293—296.

any principle but the paternal despotism maintained in the Roman jurisprudence. The legislature may ordain the civil nullity of marriage, it may take away the civil benefit and protection of marriage, and alter the law of maintenance and inheritance; but it cannot change the nature of marriage as it affects the conscience; it cannot make the marriage, except as it is founded in the perjury of one of the parties, an act of sin opposed to the law of God, and therefore void; it cannot make that which is marriage to be no marriage; it cannot justify the parties in a voluntary separation from each other, in abandoning the care of a common issue, or in revoking and transferring the vows which they have mutually bound themselves to observe; it cannot, upon any just principle of moral reasoning or political expedience, defend the nullity which it creates. The very permission of the marriage of minors both by banns and by licence implies both their natural and moral competence to marry, and in restricting that permission the law infringes the common liberty of mankind, the privilege which the Almighty has ordained for the relief and consolation of human infirmity. If the parties had come of age but on the very day of their marriage; if the marriage had been celebrated by banns instead of licence; if some form, known or unknown, had not been intentionally or unintentionally neglected; the marriage would have been affirmed: but the penalties of the law were extended beyond the design or conception of its authors in cases of the most perfect integrity and good faith which could not have been brought within its rules, but by the most subtle application of de-

tached principles of law. Such were the informality in the testamentary appointment of a guardian, the reasonable presumption of a mother's widowhood, and the incompetence of the mothers of illegitimate children, circumstances under which the courts were constrained, in violation of every equitable principle, to pronounce the marriage of a minor void. The last case was first decided in the Ecclesiastical Court, and again after solemn argument in the Court of King's Bench, when Lord Ellenborough reluctantly and after hesitation consented[l]. Lord Eldon may be supposed to have at least doubted of some of the decisions, when, in opposing Mr. Wilson's Bill for the amendment of the law, he adverted to a case which was before the Court of Chancery, and which might be argued before another tribunal[m].

In opposition to the received principles of British law and equity, and to an extent unprecedented in the foreign laws of nullity, the victims of this legislative experiment were persecuted without discrimination and without redress. The party by whose contrivance the marriage was concerted, whether by perjury in obtaining the licence, or fraud in the publication of banns, was not only exempt from all penalty, but free, in the first moment of caprice or satiated passion, to take advantage of his own wrong, and the innocent object of his delusion was also free to solicit, and unable to resist, the sentence of nullity. No distinction was made between fraud and error[n]: the marriage was intrinsically and irre-

[l] See 11 Term Reports. Priestley v. Hughes.

[m] Woodfall's Parl. Rep. vol. lx. p. 690.

[n] The whole fault of the marriage might originate in the

mediably null: and although the parents and guardians had never meditated an objection; although they had actually consented in a presumption of their right to consent; although all parties had acted in good faith; although they had lived for years in harmony; although their marriages had been acknowledged in their families and by the world; although they would have sacrificed life itself to confirm their marriage, and secure its benefits to their children; the law was inexorable: there was no redress for the original misapprehension; no advantage could be derived from the submission of the offender, the mediation of friends, or the compliances of returning affection: the marriage had been denounced by the law as a meretricious union; the husband and wife had been legally living in concubinage; their issue was illegitimate and incapable of inheritance. Even this was not the consummation of legal iniquity. If any defect in the parents'

ignorance or misapprehension of the surrogate; and the following observations are ascribed to Sir John Nicholl in deciding a case of nullity upon the ground of minority and the want of the required consent: "The marriage had been contracted in a distant part of the country, and the surrogate had granted the licence on an affidavit, which on the very face of it was defective. It stated the young woman to be only twenty years of age, and yet there was no certificate of consent by parent or guardian in her behalf. This was not the first instance of such neglect that had fallen under his notice. A surrogate in the country had a short time since written to him stating that he had granted a licence to a minor on the consent of his father-in-law, and wishing to know whether such marriage was legal. He had of course advised the parties to be immediately remarried by banns, there being no doubt, that the former marriage was *ipso facto* void." Gent. Mag. vol. xc. pt. ii. p. 488.

marriage had been overlooked or unknown, and their children had been married during their minority with their consent, their marriage also was illegal, and their children also were exposed irretrievably to the penalties of bastardy. Under such a law the whole line of descent was disturbed, and the rights of all property were insecure. A taint worse than the taint of treason was affixed to a marriage solemnized in the most undesigned violation of the statute, a statute arbitrary in its principles, indiscriminate in its application, inflexible in its judgments, and insatiable in its revenge.

It is easy to conceive the effects of such a law upon the charities of domestic life; the restraint which it would put upon the yearnings of parental affection; the watchful cupidity which it would excite among the collateral relations; the tyrannical power which it would convey to the husband; the temptation which it would offer to an unprincipled woman to abandon the maternal and conjugal duties; and the suppression of all parental affection to children, whom the law had disinherited and pronounced a spurious issue. It was a law which constituted new offences, and gave impunity to undisputed crime. The English law supposes such a duty of cohabitation in married persons, as to make the loss of a wife's society the burthen of the action for criminal conversation; but if any parties married in contravention of this statute, their cohabitation was vicious; their separation was no abandonment of conjugal rights; their infidelity was not adultery; their marriage with others was not bigamy. The nullity of their first marriage left them free to choose

their course of sin. It might have afforded a curious illustration of the confused ethics of the law, if, during the undisputed validity of the marriage, the nominal wife had committed adultery, and the plea had been repelled not by recrimination, or proof of innocence, but by allegations, then first exhibited, of minority and want of consent at the time of marriage. The legal argument would have been irresistible, but would common sense or common honour have concurred in approving the equity of the defence?

The common and only palliation of these anomalies is, that there is no legal marriage: but, if a clear view be taken of the essence of marriage, and of the peculiar forms under which it is celebrated in England, can it be said, that, because the marriage is deficient in some irrelevant form arbitrarily imposed by the law, the conjugal relation is therefore not contracted? In the parallel case, under the same statute, of marriages null by the publication of banns in an unauthorized church, and afterwards ratified by the special enactment of the legislature, when did the conjugal relation commence? When the parties in the church pledged their troth either to other? or when the Act interfered to prevent the dissolution of their marriages, when some of the parties were probably in their graves, and could derive no benefit from the Act, but in the confirmed legitimacy of their children? The same question may apply to such marriages void without consent as were ratified by the Act 3 Geo. IV. c. 75. and admits but of one resolution. The abstract essence of marriage is the consent of the parties to live together as man and

wife: policy requires that this consent shall be publicly declared; religion has ordained that it shall be avowed in the face of the Church, and ratified with sacred offices. * In the English formulary of marriage not a word is said of the consent of parents, and minors, married by banns duly published, although without consent, or by licence with consent, are joined together in indissoluble marriage. The parties are warned, that if they are joined together otherwise than God's word doth allow, they are not joined together by God, neither is their matrimony lawful: this clause, explained by contemporary enactments of marriages within the prohibited degrees, implies, that if there is no such impediment they are joined together by God, and their matrimony is lawful. No such impediment is alleged, and, according to the ritual, the man takes the woman for his wife, and the woman takes the man for her husband, to live together after God's ordinance in the holy estate of matrimony; the man further declares, that he weds the woman with the ring; they declare their mutual consent in holy wedlock by giving and receiving of a ring, and by joining of hands; the minister pronounces that they are man and wife together, and recites the words primarily relating to the institution of marriage, but in their ritual use having a ritual application: Those whom God hath joined together let no man put asunder. This is the form in which husbands and wives are joined together in England, and without which, except in the case of Jews and Quakers, there is no marriage. In this form there is certainly no reservation; and its validity is admitted in all cases in which it is not

defeated by the law. Where there is no fraudulent intention, no offence but involuntary ignorance or misapprehension, it is hard to conceive that this form does not bind the conscience: and where fraud is intended, it is equally hard to conceive that any misrepresentation out of the Church can disannul a solemn obligation contracted in the Church; and that perjury before a surrogate can cancel a vow before the minister. When the Marriage Act was passed, the ritual of marriage should have been altered in conformity with its provisions; and as in the ancient missals, a clause was inserted in the form of mutual stipulation, *if holy Church will it ordaine*, the modern ritual should have made the vow and publication of marriage dependent on the hypothetical condition of the parent's consent. The Act would thus have retained all its oppression and injustice; but the ritual would have been guiltless of the profanation of invoking the Deity in attestation of a nullity, and the minister would not have been degraded by the publication of a falsehood.

It is a proof of the fatal force of prejudice, that a statute so vicious in its principles, so arbitrary in its enactments, so indiscriminate in its application, so pregnant of moral guilt and misery, should have been suffered to disgrace the English law for nearly seventy years, and that after the full maturity of its iniquity was disclosed, the legislature should have been harassed for ten years in its amendment. The law had been nearly sixty years in operation before all the excesses of its fatal power were developed; and it was from February 5, 1812, when Mr. Wilson first moved the amendment of the law,

to July 22, 1822, before the nullity of marriage was superseded, and the good old doctrine of its indissolubility was restored.

It would be tedious to collect even the most contracted view of the arguments which were again and again urged in this decennial controversy; but it would be unjust to the opinions which have been advanced, to overlook the speech of Doctor Phillimore, in introducing the first successful Bill; and the debates in the committees of the House of Lords, on the several propositions for restricting the nullity of marriage, and for substituting voidability for nullity. A clear view may thus be obtained of the light, which the civilian, the lawyer, the statesman, and the divine, have thrown on this most interesting and important question.

Doctor Phillimore argued on the vast importance of a question affecting the very foundations of social order and the happiness of very many individuals. In repelling the charge of innovation, he observed, that the Marriage Act itself had no claim to antiquity, and was the very first instance of legislative interference with the general law of marriage received in England, whose constitution was so averse from the doctrine of nullity, that the old lawyers, who had opposed the encroachments of foreign jurisdiction, would have recoiled with horror from the imputation of bastardy upon the issue of a marriage, unimpeached during the life of the parties who had contracted it. Penalties and censures were pronounced upon irregular and clandestine marriages, but they were indissoluble. Incestuous marriages were the only exceptions; and they could only be

annulled in a court of competent jurisdiction, and during the life of the parties, whose heirs would otherwise succeed to their inheritance.

The law of precontracts, and the frequency of clandestine marriages, had undoubtedly called for reformation and redress. The Bill introduced by Lord Hardwicke passed the Lords with little opposition; but it was vehemently debated in the Commons, and was so changed and modified, that the original provisions could hardly be recognized. Lord Hardwicke nevertheless considered it expedient to pass the Bill; distinctly stating that the objectionable clauses might be afterwards amended. It was hardly possible, that a law which at one blow subverted the whole matrimonial law of England, as it had existed for centuries, should not need revision; and if its author could have foreseen its practical operation and effects, he would have been the first to propose a remedy for the evils which it had produced.

The Act was valuable, in making the consent of a parent or guardian necessary to the marriage of a minor; in abolishing the law of precontracts; and in securing the registration of marriages. It was objectionable in giving encouragement to fraud and perjury, and in taking vengeance of posterity; as if it was designed to operate upon the innocent, and to afford impunity to the guilty. It sought to enforce its provisions by mere terror, and practically gave rise to a complication of immorality and injustice.

Under this Act marriages were null, when they were celebrated by minors by licence obtained without consent; and when they were solemnized in churches and chapels in which banns had not been published before the year 1754. In the latter case the nullity

has been seldom allowed to attach: in the former no obstacle has ever been opposed to its most unrestricted operation. By this enactment of nullity the marriages in question never had any legal existence, and could not be affirmed by any act of the parties or their relations. The sentence of nullity might be obtained at the suit of the parent or guardian, against the will of the parties; of the woman, not regarding the delicacy of her sex; and even of the man who had obtained the licence on a false statement of the age of himself or of the woman whom he proposed to marry. Whether he had made the statement in ignorance or with design, he was free to take advantage of his own wrong; and by proof of the minority of either party, and the want of legal consent, to set aside the marriage at any time after its celebration, within a year, or after a cohabitation of thirty years. It might seem incredible, that a man, impelled by passion or caprice, or surfeited with enjoyment, should have the power of discarding his wife at his pleasure; that in the elevation of prosperity he might dismiss the partner of his adversity; or that, in an unwillingness to maintain his family, he might rend asunder all the tender charities of life, and turn his offspring loose upon society, as helpless and fatherless vagabonds. It was on the innocent offspring of these ill-fated marriages that the severest punishment was inflicted: the children, the grandchildren, the remote posterity, might at any time be deprived of their inheritance, on proof of the want of lawful consent to the marriage of any of their progenitors; and there was no security for any property derived by virtue of marriage contracted under the Act. The nullity ordained by

the council of Trent was not subject to the power of the party creating and concealing it. The nullity contained in an Act of the Irish Parliament, was restricted to persons possessing a certain amount of property, and must be prosecuted within a year after the expiration of the minority. The nullity of Lord Hardwicke's Bill was at variance with the whole spirit and analogy of English law; not only of that which regulates marriage, but of those great and fundamental principles on which the English law proceeds; undermining prescription, disturbing the course of inheritance, and taking away the limitation of actions. By its actual operation the marriage law does, as far as any law can license that which is *malum in se*, license adultery. If two persons of mature intellect, and perfectly competent to understand the nature of the contract in which they engage, are united together in a *de facto* marriage, deficient in no circumstance enjoined by the religious institutions of the state—if they cohabit together as man and wife, and acknowledge each other as such for many years after they have come of age, and shall afterwards separate on the plea of want of parental consent, and severally intermarry with other persons, will any one contend, that persons so conducting themselves, although they may not be amenable to the municipal law, are not, in the eye of God and man, guilty of the crime of adultery? or deny, that the municipal law, in sanctioning such conduct, does not in fact, and in the spirit of that law which is written in the heart, lend its sanction to adultery?

It might be permitted to refer to cases which had

been decided. In Wattle v. Hathaway, the man had obtained a licence upon a false oath of the woman's age: they cohabited four years, and had four children, when they fell into poverty; the man went to India, where he acquired a considerable property, and on his return to England, after having been married twenty-seven years, obtained a sentence of nullity, on the ground of the woman's minority. In Hewitt v. Bratche the circumstances were the same, and nullity was decreed after a marriage of twenty-five years. Four other cases had been decided within two years; varying in their circumstances, but shewing how the framers of the Act had been defeated by its actual operation. In Riddell v. Liddiard, the marriage had been solemnized with consent of the guardian of the woman being a minor: but the guardian's appointment was deficient in the legal attestation, and the marriage was therefore declared null by the judge, with strong comments on the hardship of the case°. In Hayes v. Watts the marriage was celebrated with consent of the woman's mother, reasonably supposing herself to be a widow: after an interval of eighteen years, it was discovered that the father was alive at the time of the marriage,

° "This marriage is in no degree clandestine: it has been solemnized with all the requisites of law. The court must deeply lament to see such a case brought before it: it is a case of hardship on society, that persons should have been so long living together as man and wife, and be cast loose on society; but it is in vain for the court to observe on the hardship, so long as the law continues on its present footing. As the law now stands, there is nothing more to be done, than to pronounce this to be an invalid marriage." Speech, p. 25. Many more cases are added in the notes.

which was therefore declared null, as the judge observed, without any imputation of fraud. In Jones v. Hazlewood, the parties were married by licence obtained on the man's oath that both were of age: after a cohabitation of thirty-eight years, it was proved that the man was not of age, and that consent was wanting, and the marriage was nulled at the suit of the woman.

The Act operated with infinitely more rigour in the case of illegitimate minors, especially of those who were married before the recent decisions on the construction of the law. Men of ordinary talents and acquirements could not have foreseen, that, in cases where the putative father, or where the natural mother, was present and consenting to the marriage, the marriage should nevertheless be null for the want of legal consent. It required professional acuteness and experience to ascertain the incompetence of the parties consenting, and the consequent nullity of the marriage, for want of consent of the court of chancery. It was only after long and elaborate arguments in various courts, and after doubts on the part of some of the learned judges, that the point was decided, first by Sir William Scott, in 1799, and afterwards by Lord Ellenborough, in 1809, after some hesitation, as has always been supposed, in the case of Priestly v. Hughes. In this case, J. W. Hughes had married Jane Roberts, illegitimate daughter of Thomas Jones, in the presence of her natural mother, and with her consent expressed in the licence. J. W. Hughes died, leaving an only daughter, in whom apparently vested considerable property, left by the father of J. W. Hughes,

which was wrested from her by the heir at law proving the nullity of her mother's marriage, celebrated without consent of the Court of Chancery. In Horner v. Liddiard; Hannah Liddiard was the daughter of John Whitelock by Sarah Liddiard; Whitelock bequeathed to Hannah Liddiard considerable property, appointing her natural mother and another person his executors and the guardians of the child. The other guardian died; and at the age of twenty years, with the consent and in the presence of her natural mother, Hannah Liddiard married Mr. Horner, at whose suit the marriage was afterwards annulled for want of legal consent. Frances Davidson, an illegitimate minor, was married with the consent and in the presence of her natural mother, and after an interval of twenty-five years the marriage was declared null at her suit.

Cases of this description had been formerly few, but of late years they had been exceedingly multiplied, and would probably continue to multiply in an increasing ratio. Since 1810, forty cases of nullity, for want of previous consent, had been decided in the Consistory Court of London, and twenty in the Arches Court of Canterbury. The same suits might also be entertained by all the Ecclesiastical and Consistorial Courts, in the Courts of Quarter Sessions, and in the Courts of Common Law; and the nullity of these marriages might also be established without the sentence of any court. The evil was therefore of an extent to demand the interference of the legislature.

It was proposed to rescind the clause of nullity, and to convey to the father, guardian, mother, or

guardian appointed by the Court of Chancery, a power of annulling a marriage contracted without consent, by a suit in a court of competent jurisdiction. It was found impossible, on mature consideration, to invest either of the parties contracting the marriage with the same power.

Justice demanded that the law should be retrospective, and it was proposed to affirm all marriages, celebrated without consent before the passing of the Act, in which the parties shall have attained the age of twenty-one years, and be living together, unless a suit shall be instituted within six months. It was a strong argument for the retrospective operation of the Bill, that it had inflicted wounds which ought to be healed, and involved many families in a state of the most distressing uncertainty, which the legislator only could relieve, as he was not restrained by any particular law, but directed in all his acts by the principles of all law, equity and expedience. Precedents in favour of the retrospective clause might be found in the Bills introduced for the confirmation of marriages celebrated in churches or chapels in which banns had not been published before the year 1754. These cases appear to stand precisely on the same ground. In both cases there were marriages *de facto*, but not *de jure:* in both cases therefore the marriages were legally null, and nothing short of a retrospective law could render them valid. The law which had been applied in the one case should not be withholden in the other. The rights of third parties, if such unhallowed pretensions might bear that name, were equally affected in both cases: for if there be a nullity of marriage, the

relative situation of third persons to the parties married must be the same, whatever be the ground of nullity. In very many cases both parties, at the time and for many subsequent years, were completely ignorant of the nullity of their own marriage. One of very many cases of crying hardship might be recited. Twenty years had elapsed since a marriage was solemnized between two minors with the full consent and in the presence of the parents of both parties: four years ago the eldest daughter of that marriage was married with the entire consent of her father: children were born of this marriage, but after its solemnization the father of the woman discovered that he was born before the marriage of his parents, a circumstance which had hitherto been studiously concealed from him. The consequence was, that not only all his children, but all his daughter's children became as it were *ipso facto* bastards; no guardian appointed by the High Court of Chancery gave consent to either of these marriages. A nullity had been engrafted upon a nullity, and it might have proceeded *ad infinitum*; for if the granddaughter had been married with her father's consent, before the flaw had been discovered, her issue would also have been illegitimate. It was in vain that all the family in all its branches concurred in an anxious wish to give stability to two marriages, solemnly and *bonâ fide* contracted, deficient in no religious ceremonies, and consolidated by reciprocal affection, and the birth of numerous issue: it was in vain that the parties to each of these marriages, endeared to each other by the strongest ties of mutual affection, and deeply impressed with the sacred nature of the

bond which united them, earnestly and anxiously sought for a process of law by which their marriages might be declared valid. Without the success of the proposed clause their case was hopeless: the children and grandchildren must be degraded from the station which they had hitherto occupied in society, and be considered in law as the offspring of a meretricious union. All marriages of illegitimate minors without consent of Chancery were in the same condition.

There was a striking anomaly in the statute, which ordained, that if marriages of minors without consent were celebrated by licence they could never be legalized: if they were celebrated by banns they could not be called in question, although it was notorious, that the publication of banns was subject to the most fraudulent abuse. It was proposed to remove this anomaly, and to place the publication of banns under new regulations.

The principal points of this luminous argument[p], by which an experienced civilian introduced the measure to the House of Commons, were necessarily enforced or contested when the measure was debated in the House of Lords; and it will be sufficient to present a very brief summary of the arguments used in the Committee on the clause for restricting the nullity of marriage.

The advocates[q] of the restriction regretted that a law which was irreconcileable with religion, justice,

[p] See Substance of the speech of Joseph Phillimore, LL. D. in the House of Commons, March 27, 1822, on moving for leave to bring in a Bill to amend the Marriage Act.

[q] Earl of Westmoreland and Lord Ellenborough.

and humanity, had not been already amended, and that effect had not been given to a measure now made familiar by repeated discussion, and recommended by frequent sanctions of the other House. The judgments of the courts proved the insecurity of all hereditary titles, derived in succession from ancestors whose marriages might have been vitiated by casual oversights and informalities, naturally resulting in the bastardy of their issue; and they enforced the necessity of ratifying all marriages contracted in good faith, and annulled only in consequence of accidental omissions. It was not unprecedented, it was not inconsistent with the prospective clauses of the Bill, to counteract effects which had not been foreseen, and which for a long time had not been acted upon. The great object of the Bill was to give confidence to the most important relation of social life, and to ascertain who were and who were not married. This was at least due to the institution on which the succession of property and civil rights depended, but which the existing Act so far subverted in opposition to the ancient law, that, while it ostensibly professed to prevent clandestine marriages, it annulled those which ought to be binding, and inflicted a stigma on persons who were under an obligation to live together. It was right to protect youth and property, but it was also right to prevent acts of fraud and spoliation, and to give security to all who complied with the law as far as they were acquainted with its provisions. The authors of the law could not have intended that a marriage should be dissolved at the suit of a man who had compassed it by his own perjury, or at the suit

of an heir at law, from the merest motives of selfish interest, or that the law should arm the dearest connexions against each other, and extinguish the sentiments of honour and affection. These evils of the law, these temptations to crime and to the violation of the most sacred duties needed only to be mentioned to be restrained. The main objection was, that the measure affected the rights of third persons, whose rights were however sufficiently protected, if indeed any thing more than their expectations were in danger. The interest of an uncle in the nullity of a nephew's marriage would for instance be defeated by the legal marriage of that nephew. It was incumbent on the legislature to overlook such expectations, and the rights of third parties had been again and again infringed; by the Act of Henry VIII. in confirming all marriages celebrated in the face of the Church; by the restrictions which had been put upon the Marriage Act in respect of one class of void marriages, and by the general law, which allowed no suit of nullity to be brought but during the life of the parties. To allow the parties themselves to commence suits of nullity was to allow voluntary divorces. Under the proposed law the parents would have the power of dissolving the marriage within a limited period, at the expiration of which it could be no more impeached. It was natural to look to a better system than this, under which marriage should be indissoluble but by the adultery of one of the parties. It might be observed, that the present Act was nugatory, and might be evaded, by a foreign marriage; by a secret publication of banns; and by a marriage after the parties should come of age.

The arguments for the immediate amendment of the law were, that no more nullities might be incurred; that the rights of property might be secured; and that every man might be assured, that the law, which maintained him in the possession of his inheritance, would also enable him to transmit it to his posterity. The welfare of society demanded, that the principles on which the security of property depended should not be opposed to the rules of morality and religion.

The apologists of the existing system[r] admitted the importance of the subject, and the occasional evils of the present law, but the reverence due to the great name of its author often checked the desire of seeing it reformed. Various Bills had indeed proceeded from the Commons, but, notwithstanding the corrections and assiduous attention which they had received, they had all failed of their Lordships' approbation: nor would it secure the success of the present Bill to point out the evils which it was intended to remove, without shewing that the proposed alterations would not be more mischievous. The long period over which the existing law had operated, and the prodigious interests which it involved, required that a full view should be taken of all the difficulties of the question. It was clearly within the competence of a civil jurisdiction to consider the age and circumstances, and to prescribe the forms, of marriage, and to exercise a controlling authority over the whole subject. Dangerous consequences might arise, and it might be difficult to distinguish between marriage and concubinage, if

[r] Lords Stowell and Eldon.

private judgment were allowed to fix the terms which should constitute marriage. For its more security, marriage before the Reformation had been considered a personal sacrament, in which the intervention of no third person was necessary: and even now in Scotland marriage was dependent on nothing but the declared will of the parties. At the Reformation a material change took place, and many attempts originating in the Upper House, and no doubt with royal sanction, were afterwards made to give a more definite character to this institution. The Act of George II. had been demanded by the gross abuse of former laws, under which every legal restraint had been eluded, and youths of the best families had been inveigled into the most unhappy connexions. A prompt and efficacious remedy was required, and if the means of prevention had been clear, the present evils could not have arisen. The Bill framed by Lord Hardwicke became the law of the land, and had continued in operation ever since. It was ignorantly supposed, that under this Act marriages of minors without consent were good in themselves, but voidable in the ecclesiastical courts: but, in truth, they were absolutely null, and, whatever ceremonies might be observed, they signified nothing, and imposed no obligation; the parties might again be married to other persons; their infidelity to each other did not amount to adultery; the woman had not acquired, and therefore could not forfeit, the character of a wife; the issue was necessarily illegitimate; and, however the parties might live in full confidence of their marriage, it was in law a perfect nullity; the parties had made a law for themselves, and they

must abide the result. The only question therefore was, how far it might be convenient to leave these contracts for a certain interval to be decided by others. But perhaps there could not be a worse evil than the voidability of marriage. At present the law was fixed and definite: the marriage without consent was intrinsically and irremediably null. It was known that these marriages were usually contracted not against, but without, consent: they might be, and they often were, industriously concealed; and if they were made voidable only, and dependent on the sentence of a court, there would be no end of the perplexity and confusion. It had been said, that the parties might be betrayed into error, through ignorance and misapprehension of the law, with which they were willing to comply, and that time should be allowed for the supply of the requisite forms. If this principle should be admitted, the time thus allowed should be scrupulously restricted to the period absolutely necessary for the purpose which was contemplated. It was necessary that the parties should know with the least delay, whether they were or were not married. Parents should not be allowed to deliberate, whether they should invalidate or confirm the marriages of their children; they should not have the power of suppressing their resentment for a time, and afterwards, in the exercise of a cruel right, of annulling the marriage, after the birth of a numerous progeny, whom their act would render illegitimate. Again; the parent might die during the minority, and this singular anomaly would result. Of the children of two fathers, both withholding their consent from their marriages, the one

by the death of his father would be lawfully married; the other, whose father survived, would not be married at all. The evils of a voidable marriage were increased in proportion to the length of its duration, and the period allowed for avoiding it. On the rights of third persons it was material to observe, that there were vested interests besides those of which the party was in possession, and that they might be the more valuable of the two. Thus an elder brother, illegally married, possessing an entailed estate, might have a younger brother legally married: the children of the latter would have a vested interest in the estate, more valuable than their father. The session was however drawing to a close, and the measure might be deferred to another year, when it might originate in the upper House, and have the benefit of all the learning which peculiarly belonged to the subject.

Nothing could be stronger than this argument against voidability, which arose on the clause for rendering the marriages of minors without consent null, at the suit of the parents during the minority: and the force of the argument was justly appreciated by the rejection of the clause. The argument in favour of nullity of marriage failed at the same time to produce conviction, and the practice of nullity was for the future effectually restrained. Thus the exertions of all who laboured for the amendment of the law were more than fulfilled: the validity of all marriages celebrated in the face of the Church was reestablished; the law of marriage was rendered definite and distinct; the vow of marriage, according to its primitive institution, was again irrevocable.

The intrinsic force of the argument, which produced these results, could not have been more clearly proved, than by the decision of the House, which would not have lightly disregarded the opinions and suggestions of the Lords Stowell and Eldon.

The new Bill was embarrassed with exceptionable forms, and excited so much popular clamour, as to call for immediate revision: and in the following session a committee of the Lords was appointed, to consider the improvements which were required. In this committee, notwithstanding the force of the argument against the evils of voidability compared with nullity, a clause of voidability was proposed, and it was carried by a majority of seven to four, in the absence, as was alleged, of some of the members, who would not have concurred in the proposition. It will be proper to take the substance of the debate, when this extraordinary clause was moved in the committee of the House.

It was argued against the clause of voidability, that marriage was a religious contract instituted by God; and that the proposed clause was contrary to the plain rules of Scripture, that a man should leave his father and mother and cleave unto his wife, and they twain should be one flesh; that what God had joined together man should not put asunder; and that a man should not put away his wife except for the cause of fornication. These were authorities which should govern the law of man, and with which the present form of Solemnization of Matrimony was in just conformity. It was a mockery, to allow the dissolution of a marriage, solemnized with all the sanctities of religion, in which the parties

solemnly pledged themselves to keep the vow and covenant betwixt them made, and were pronounced to be man and wife, in the name of the Father, of the Son, and of the Holy Ghost. The parties were challenged to declare whether there was any lawful impediment to their union, and the absence of such impediment should in a religious sense determine the validity of their marriage, which nothing could annull but a previous contract or affinity. These considerations weighed upon the mind with a force which could not be resisted: and it would be dangerous to deny the religious character of marriage, the main principle of that conjugal virtue, which was the best foundation of public virtue and domestic happiness[s]. It was indeed within the competence of the state, to make laws and prescribe forms of marriage, without which the whole institution might be perverted; but, as a measure of legislation, the proposition must be nugatory, and might be defeated by a foreign marriage, or by a fraudulent publication of banns, which was the most ordinary means of compassing clandestine marriages; and the greatest difficulties would arise in the practical operation of the clause, in respect of the rights of the husband and trustees during the period of voidability, in which it was doubtful how far they could alienate the property of the woman, or what might be the consequences if money was lent upon the security of that property[t]. Policy demanded that the inconsi-

[s] Bishop (Law) of Chester; Archbishop (Vernon) of York; Lord Ellenborough.

[t] Earls of Liverpool and Westmoreland; Lord Ellenborough; Archbishop of York.

derate marriages of minors should be restrained by any means short of voidability[u]; and there was sound wisdom and justice in a subsequent clause, which prevented men who married from merely mercenary motives from deriving any benefit from the fortune of the wife. When a choice was to be made between restrictions too easy and too rigorous, the more lenient course was generally to be preferred; but on a comparison of the opposite evils of nullity and voidability, the former appeared to be the least objectionable. If the parties took the vows tendered to them falsely and knowingly, there was a ground of nullity; but it was preposterous, that they should ever be in a condition to declare, that they knew not whether they were or were not married; because the validity of their marriage depended on the will of a third party, which they could not control[x]. The end of all matrimonial law was to render the marriage certain between the parties and all the world besides: for others with whom the parties might have occasion to deal, were interested in the validity of their marriages; and if the subject were contemplated in this light, it was highly inexpedient to admit the interference of a third person to dissolve the marriage, to the detriment of the persons with whom the married parties were connected. The disadvantages of such a law were far greater than any advantages which it could be supposed to produce, and confirmed the conviction in favour of nullity compared with voidability of marriage[y]. In

[u] Archbishop of York. [x] Earl of Liverpool. [y] Lord Redesdale.

a moral view of the law and its consequences, the wounded feelings of the parent, and they were often no more than feelings of mortified ambition or disappointed avarice, could not be weighed in the scale with the injury and degradation of the woman, and the bastardy of her children[z]. It was necessary to contemplate the probable effects of the measure upon the woman, the man, and the parent or guardian. The woman whose marriage should be annulled would have nothing before her but misery and ruin; and it was impossible to conceive any circumstances under which the woman's parents could desire the nullity of her marriage, or any state more distressing than the interval of suspense, during which the parties whose intentions were honourable might doubt of the validity of their marriage. No immunity was due to the man who could consent to abandon the woman whom he had engaged to cherish; and it would be dangerous to public morals to allow a dissolute minor to effect a seduction under the pretence of marriage and the forms of religion[a]. The most anxious responsibility would also devolve upon the guardian, who would be called to decide, without knowing the feelings of the parties, or being able to decide what duty required him to do. It was desirable therefore to restore the old law of the country, which still prevailed in most foreign nations, and especially in Scotland, where the feelings of aristocracy were stronger than in England, where the contract was purely of a civil nature, and where

[z] Bishop of Chester. [a] Archbishop of York and Earl of Liverpool.

no evil resulted from the facility with which it was concluded[b].

The supporters of the clause of voidability were concerned at the objection which had been made, and were persuaded that it was unfounded. They argued that the clause was not contrary to the principles of morality or the authority of the Scriptures, which contained nothing to prevent national societies from prescribing the forms which should ascertain the validity of marriage. The true question was, not whether man should disturb the union which God had sanctioned, but whether the union under certain circumstances had received the sanction of God. It was true that certain words of Scripture were used in the solemnization of matrimony, and that marriage had been formerly held to be a sacrament of the Church; but it was nevertheless competent to man, as should be most for the convenience of man, to ordain the forms of the contract which were not found in the Scriptures. If these laws and forms of marriage were consistent with the revealed will of God, and were truly complied with, the union was sanctioned by divine authority; but it was impious to call those marriages the act of God which were compassed by fraud and perjury, in direct contradiction of the laws both of God and man. The marriage ceremony was founded on the assumed agreement of parties competent to enter into the union on the terms prescribed by law. Let the religious ceremonies be ever so simple, the marriage contracted under them could not be confirmed by

[b] Earl of Liverpool.

any possible addition; but if the law added other terms, such as solemnization in a church, a licence, or publication of banns, the religious ceremony was not sufficient if these terms were not fulfilled[c]. As minors were to a certain extent incapable of acting, as in the disposal of their property; and irresponsible for their acts, as in the case of debts; it was not inconsistent to restrict their power in respect of an engagement which concerned their fortune, their happiness, and their virtue; and which should not be contracted without the utmost circumspection. Their marriages had therefore been placed under certain regulations; and it was now to be considered, whether marriages contracted in violation of those regulations should not be voidable[d]. When of old the assent of parents to the marriage of minors had been assumed, nothing was in fact required but the consent of the parties. Measures, including nullity of marriage, had however been proposed at different times, for strengthening the parental authority, which the committee, to whom the matter had been lately referred, found no methods of supporting, but nullity, preventive measures, voidability, and the stimulus to parental jealousy, which might arise from the entire emancipation of youth. Voidability had therefore been recommended, not because it was free from reasonable objections, but because it was preferable to the entire dereliction of parental authority; because it would be vain to recommend the plainer course of nullity; and because preventive

[c] Archbishop (Sutton) of Canterbury; Bishop (Howley) of London; Lord Eldon; Lord Sidmouth; Lord Redesdale.

[d] Bishop of London; Lord Redesdale.

measures had been found ineffectual. In a neighbouring kingdom, marriages had been protected by voidability in the same manner and for the same purpose as was now proposed, and no pernicious effects had been produced. In Ireland a distinction had been made in respect of property, but it was an invidious and unjust distinction, and would not be approved in this country. It had been argued that the clause would operate to the protection of young men and the prejudice of young women, whose interests should be treated with care and tenderness; and that the injuries which it was sought to prevent were more commonly inflicted upon women than upon men. It would not however be denied that young men also required the protection of the law; and it had been found in a long course of professional experience, that young men were more commonly involved in disgraceful and ruinous marriages than young women. This effect naturally resulted from the more guarded education of young women, from the more constant superintendence of their parents, and from the natural delicacy of their sex; while young men, in schools, and colleges, and large towns, removed from such protection, and left to their own discretion, were in more danger of forming unsuitable connexions, and engaging in improvident marriages. It had been said that the clause would be nugatory; but there would be an end of all legislation, if the possibility of eluding a law was to be made a just objection to its enactment. The clause might be called an experiment; but it was an experiment which had not been tried, and which was worthy to be tried; in the suggestion of which the

committee had acted with the best intention and with the maturest deliberation; and which it might be hoped would not be followed by the disastrous effects which were anticipated[e].

On a division the clause was rejected: contents 22; non-contents 28: and this small majority has probably abolished for ever in this country the nullity of the marriage of minors contracted without consent, and restored a wholesome state of law, under which every man may know whether he is or is not married; under which every man who is interested in the marriage of another may be assured of the fact; and under which, according to its primitive institution, marriage has resumed its proper character of an irrevocable obligation.

Three cases of nullity are recognized in the Act[f]: viz. if the parties shall knowingly and wilfully be married, 1. in any unlawful place, other than a

[e] Lord Stowell.

[f] The Act does not interfere with any of the provisions of the old law in respect of marriages by banns, which remains in full force in all that regards true and accurate publication of Christian and surnames: and as the old law declares that in every case, where there shall be a defect of these particulars, the marriage shall be *ipso facto* void; the same consequence endures under the same circumstances under the new Act. By this rule, the case of Fagg against Sergeant, otherwise Lord, otherwise Farrington, falsely calling herself Fagg, was decided in the Consistory Court, July 20, Nov. 8, 1824. In this case Mr. Fagg married the lady under the name of Farrington, her real name being Sergeant, while her name of repute, or that by which she was known among her acquaintance, was Lord. All the objections to nullity of marriage by licence apply to nullity of marriage by banns: if it is not fated that there shall be an anomaly in the two cases, the same rule should govern both.

church or chapel, in which banns may be published: 2. in any unlawful manner without banns or licence: 3. by any unlawful person, i. e. by a person not in orders. As the Church of England gives sanction to none of these marriages, as her ministers cannot be supposed to assist in ratifying them, and as the penalty is restricted to offenders knowingly and wilfully offending, it would be gratuitous to offer any objection to their nullity. The parties themselves can hardly fail of knowing whether they are married in a church or authorized chapel, by licence or by banns, and they can marry in no other place and in no other manner without the grossest collusion. They have not the same power of ascertaining whether the person who marries them is or is not in orders, and the penalty is therefore rightly restricted to cases in which they act knowingly and wilfully. If they voluntarily offend against the premises, the connexion is compassed by their own fraud and contrivance, and might probably be cancelled without the aid of the statute, in a suit of jactitation of marriage. It may probably be objected that the ratification of these irregular marriages, even if the parties shall act in ignorance and unwillingly, is an innovation upon the law of marriage, which has from the remotest periods required a properly sacerdotal benediction, and the interpretation of the law may be called in question. The words of the Act are, "If any person shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage, by any person not being in holy orders, the marriage of such persons shall be null and void." The converse of the proposition is, that if they shall

not act knowingly and wilfully, the marriage shall not be null and void: and whatever be the innovation, the principle is just. The parties act in the fair presumption that the ministrations of the Church are lawfully conducted; that the persons appearing as her ministers are what they pretend to be; and they have no means or authority for examining the truth of their pretensions. It has happened, but under the present law it will hardly happen again, that persons married, as they presumed lawfully, certainly without any fraudulent intention, without any consciousness of doing wrong, by the mere act of another, in which they did not connive, which they did not suspect, which they had no means of discovering or preventing, have been amerced of their matrimonial rights, and reduced to the necessity or the chance of being married again; it may be after the birth of issue, thus deprived of their natural inheritance. It is impossible to palliate the hardship of this proceeding; or, with the most extreme jealousy of the ministration of the Church, to deny the expedience of acknowledging an irregular marriage, in preference to the infliction of accumulated injury on the innocent and undeserving. There is no penalty not due to the person, who, "falsely pretending to be in holy orders, shall solemnize matrimony according to the rights of the Church of England;" and it is an enactment of perfect justice, that "every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years,

according to the laws in force for the transportation of felons."

Although the principle and law of nullity of marriage have been investigated with tedious prolixity, it would be improper to overlook certain objections[g] against the amended law, which is worthy to be vindicated from the most captious exceptions.

It is objected, that the clause of voidability proposed by Dr. Phillimore, "obtained the sanction, or rather was inserted at the instance, of the most distinguished law lords; was adopted and recommended by the Lords' committee; was entitled to a more dispassionate consideration than was given to it; and that the apprehensions of the law lords were treated with disrespect." There is no difficulty in turning the course of this stream of authority. Lord Redesdale, in 1823, argued against the proposition, and declared that nullity was in his judgment preferable to voidability. Lord Stowell, when the clause of voidability was brought forward in 1822, argued in the most convincing manner against the evils which it involved; and was so far from changing his opinion, that although he concurred in the recommendation of the committee of 1823, he nevertheless declared the bias of his own mind to be in favour of nullity in preference to voidability; and only acquiesced in the latter, in a conviction that the former would be proposed in vain. The Lord Chancellor Eldon also, in 1822, powerfully demonstrated the mischievous operations of voidability.

[g] See British Critic, new series, vol. xix. p. 655—660.

Such were the opinions of the most distinguished law lords.

It is an equivocal apology for the meditated clause, that "whatever be its merits or demerits, it is innocent of all the mischief which has been laid to its charge. It was not contrary to the law of God; it did not afford encouragement to the seducer; it did not derogate from the sanctity of marriage or the dignity of the priesthood." The innocence of the clause was quite unexceptionable; it never had legal existence or power in England; it was but a thesis for the trial of polemical skill, conducted with the most unblemished liberality. Some of its negative merits may claim the consideration of a moment.

The clause of voidability was "not contrary to the law of God." There is a distinction which no careful writer will overlook, between nullity and voidability of marriage. The advocates of the former contend, that when a marriage is null it never for one moment has existence as a marriage; and so far their doctrine is clear from the imputation which may attach to the dissolution of marriage: but voidability implies the validity of the marriage until such time as it is actually voided; in other words, its permanent validity, unless it is voided by a court of competent jurisdiction. This interpretation is confirmed by a clause in the proposed Bill; in which, in dependence upon the clause of voidability, it was provided, "that notwithstanding any such marriage shall be declared null and void . . . the husband shall nevertheless continue liable for all the charges and expences . . . incurred in maintaining the wife during the coverture, and until the avoidance of the mar-

riage by the judgment of the court, and for all such just debts as she may have lawfully contracted during that period; and he shall be answerable for the maintenance of any child or children born of such marriage, in the same manner as if the said marriage had continued valid[b]." Here the parties are called *husband* and *wife*; provision is made for the maintenance of the child or children born of the *marriage;* and there is an hypothetical view of the *continued validity* of the marriage. Now the essence of marriage by the law and institution of God is, that the man shall cleave unto his wife, and they two shall be one flesh: it is impossible to conceive how the voidability of a marriage of acknowledged validity can be compromised or shewn to be "not contrary to the law of God."

It is further insisted, that "of all the grounds that were ever taken for condemning the voidability clause, the religious grounds are the most unsubstantial and treacherous . . . . the arguments from Scripture rested upon a most extraordinary misapprehension of our Saviour's words: Those whom God hath joined together let no man put asunder. They refer to the *institution* of the marriage state, and not to the celebration of the marriage ceremony."

[b] See Bill, intituled, An Act for amending the laws respecting the solemnization of marriage in England. Ordered to be printed 13th of May, 1823. Another clause enacted, "that if either of the parties shall die before the institution of a suit, no suit of nullity shall be commenced; and if any suit hath been commenced, the same shall be discontinued, and the issue shall be legitimate." So decidedly was the original validity of the marriage affirmed.

As the words stand in the Gospels they refer originally and generally to the institution of marriage; as they stand in the Liturgy, and are accompanied with the significant act of the minister, they have a reference to the celebration of a particular marriage: and so far is this from being a new or incorrect exposition of the liturgical application of our Saviour's words, that it is sanctioned by the most eminent ritualists, Comber, Wheatly, and Shepherd. Under this construction, or indeed under any construction, it is very readily conceded, that the words "prohibit us from annulling any marriage vow," and that "the promise in the sight of God is irrevocable and irreversible." It is not however meant to concede that under this interpretation they "lead to the conclusion, that neither licences nor banns, or altar or priest, can be required as indispensable to a valid contract," or that our laws, "in requiring them, are a monstrous system of impiety and injustice." Our Saviour's words, in prescribing the permanence, preclude the voidability of marriage: but they have no reference to the circumstances alleged, which are not indispensable to a valid contract, but are proper and useful in preventing clandestinity, in procuring a public attestation of the marriage, and adding new solemnity to the vow and covenant. It is again asked, "Even supposing that God joineth those and those only who are married by a priest, what right has the Church to restrict the priest's privilege to certain hours of the day, to certain consecrated places, and to a certain prescribed form of words? Why may he not solemnize matrimony without banns or licence?" The answer which the objector

returns to his own question is, "For this single reason; he is forbidden by the law:" and he might have added, that in these requisitions the law is not partial or arbitrary, as in enacting the nullity of marriage in a particular case, but directed generally to the public good; and he should have shewn that the public good forbids, and that the law of the country forbids, the priest to marry minors, or there is no analogy in the cases which he pretends to compare. The marriage of minors was annulled, not forbidden; marriage out of the church and the canonical hours was forbidden, not annulled, and might be sanctioned by special licence.

The objector asks, "What shall constitute lawful marriage? What degree of notoriety shall be given to its solemnization? What consents shall be obtained, and what ceremonies observed, in order to give certain civil rights to the parents and their issue?" With the exception of the rule of consent, the questionist knows that the agreement of the parties to live together till death shall part them, declared in the face of the congregation, according to the ritual provided, constitutes lawful marriage in England. "These points are to be," and have been, "determined by the law of the land, and it may employ effectual means to enforce its decision." Let this be granted; the question still remains: Is the necessity of parental consent, or the right of nullity, founded on such clear authority of the Scriptures as to render void or voidable the marriage which is contracted without consent? Is the necessity of consent so indispensable to the public good as to justify the legislature in putting restrictions

upon the law of marriage in order to prevent it; in disannulling a religious vow administered without any reference expressed or implied to that consent; in counteracting the truth of a public declaration of the marriage, delivered without any exception or reserve? It is but begging the question to contend, "that the parties who are married by licence, and have obtained that licence by perjury, cannot well claim the privilege of being joined together by God," whose providence nevertheless gives in many instances a successful issue to very unlawful means; and it is the excess of misrepresentation to assert, that "the priest, who has been deceived by a solemn lie deliberately asserted in the most holy place, can hardly complain that his ministrations are dishonoured." It is notorious that this solemn lie is never asserted at all, or at least in no place more holy than the office of the surrogate, and never by the woman, who has no part in procuring the licence. When it is argued, that "children are prohibited from entering into a variety of temporal engagements, on the mere account of youth," and when it is asked, "What pretence is there for saying, that it is unjust, unchristian, and improper to postpone their capability of forming an indissoluble engagement until they are arrived at years of discretion?" it might have been remembered, that the age of discretion and capacity of marriage legally arrives before the expiration of the minority, and that the validity of a minor's marriage, if it be by banns, is expressly recognized in Lord Hardwicke's Bill. Is there then, after the disapproved precedent of the Irish law, any thing in the condition of the

wealthier classes of society, whose marriages are most usually solemnized by licence, which renders them less competent to marry during their minority? or are rank and property to constitute a secret criterion for ascertaining the validity of the marriage, the obligation of the vow, and the truth of the publication?

The striking anomaly of annulling the marriage of minors by licence, and confirming the marriage by banns, is not overlooked by the objector, who thinks that nullity "ought to be extended to all cases, or taken away from all," and that "the instances in which minors have been entrapped into matrimony are not so numerous or so painful as to call for a stretch of power to prevent their recurrence." In arguing against the imputation of the immoral tendency of the proposed clause of voidability, he admits, "that in extreme cases only would the remedy be put in force." But who should judge of the extremity of the case, and would these extreme cases be "so numerous as to call for a stretch of power to prevent their recurrence?"

If the doctrine of nullity of marriage had under any circumstances been agreeable to the common sense and feeling of mankind, it would have been more generally established in the world, and its defence on a particular occasion would not have failed under the ingenuity, the eloquence, the erudition, and authority with which it was conducted. The right of nullity is liable to so many exceptions in practice; its theory has no solid foundation of Scripture, primitive antiquity, canonical law, or common practice; it is evidently and entirely derived from

the excesses of paternal power maintained in pagan Rome, and adapted to a peculiar condition of society. It is inconsistent with the nature of a vow; it is contrary to the essence of marriage; it is at variance with the formularies of the English Church; it was unknown to the English law before the Act of 1754; its authors could not anticipate its mischievous operations; and the judges by whom it was administered avowed its injustice and oppression. The clause of voidability was impugned by its very supporters, and the whole law of nullity, the stigma of the Statute Book, has been almost, if not altogether, rescinded by the repeal of a single and solitary statute, and marriage has been rescued from the arbitrary experiments of man, to the freedom, the virtue, the wisdom, and the power of a divine institution. There is not a man who now regrets the repeal of the abolished law, or who has not occasion, when he reflects upon the sorrows which it might have entailed upon his own children, to be thankful for the wisdom, the energy, and the perseverance by which it has been amended.

SECTION III.

Marriages of the Royal Family.

THE prolixity of the argument upon the law of void and voidable marriages, and of the attempt to prove that no authority short of a divine prohibition, positively declared or reasonably inferred from the common practice and natural feeling of mankind, is sufficient to preclude and nullify marriage, and that it is only upon assumed and arbitrary principles that marriages, contracted not otherwise than God's word doth allow, have been vitiated and annulled, will render it unnecessary to insist at any considerable length on the peculiar laws which regulate the marriages of the Royal Family, and the penalties by which those laws are enforced.

The consent and approbation of the king is necessary to the marriage of his children, his grandchildren, and the heir presumptive of the crown. The most frequent instances of the crown's interposition go no farther than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals, as great nieces, first, second, third, and fourth cousins, and the blood royal in general. By statute 28 Henry VIII. c. 18. it was made treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brethren or sisters. And now, by statute 12 Geo. III. c. 11. no descendant of the body of King George II. other than the issue of princesses, married into

foreign families, is capable of contracting matrimony without the previous consent of the king, signified under the great seal, and any marriage contracted without such consent is void. Provided, that such of the said descendants as are above the age of twenty-five years may, after a twelvemonth's notice given to the king's Privy Council, contract and solemnize marriage without the consent of the crown, unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present, at any such prohibited marriage shall incur the penalties of the statute of præmunire[a].

The penalties of the statute of præmunire include the removal of the offender out of the king's protection, the forfeiture of his property to the king, and the imprisonment of his person during the king's pleasure. The offender is secure from public wrongs, but he has no claim upon the protection of the law to guard his civil rights, or to afford redress for any grievance which he may individually sustain[b]. Prosecutions upon a præmunire are now unheard of in the courts, and, under the present administration of the law, the penal provisions of the statute are a dead letter, and might be found of difficult execution. It is not meant to palliate the offence of a voluntary and deliberate connivance in furthering these marriages, which certainly calls for any reasonable punishment which can be inflicted, in consideration of the act of disloyalty to the paternal

[a] 1 Bl. Com. c. 4. [b] 4 Bl. Com. c. 8.

character of the sovereign; of the violation of positive law; of the degradation and embarrassment of the Royal Family; and of the irreparable injury to the woman, who, under the form of marriage, is betrayed into a state of legal concubinage, and the parentage of a spurious issue.

Whether the political expedience of the measure is sufficient to justify the nullity of a marriage contracted without consent of the king by a member of the Royal Family under twenty-five years of age, or after that age without the silent concurrence of the two Houses of Parliament, is a question which rests entirely upon its own merits. In the latter case it is essentially distinguished from the right of paternal power, asserted in the Roman laws, the precedent and original of nullity of marriage, unfounded and assumed, as that right has been shewn to be: and there is no principle but political expedience to which the nullity of a royal marriage is or can be referred. It was "from his paternal affection to his own family, and from his royal concern for the future welfare of his people, and the honour and dignity of his crown, that the late king was graciously pleased to recommend to Parliament to take into their serious consideration whether it might not be wise and expedient to supply the defect of the laws, and by some new provision more effectually to guard the descendants of King George II. from marrying without the approbation of the king; and the Parliament took this weighty matter into their serious consideration, and being sensible that marriages in the Royal Family are of the highest importance to the state, and that therefore the kings of

this realm have ever been intrusted with the care and approbation thereof, and being thoroughly convinced of the wisdom and expedience of what his Majesty had thought fit to recommend[c]," passed the Act for the better regulating of the marriages of the Royal Family. The Marriage Act of George II. had introduced the principle of nullity into the English law, and the spirit of terror which breathed through that statute had been made familiar to the legislature, before an interval had been allowed for the proof and exhibition of the stupendous iniquity which it was capable of producing. If it had been explained to the sovereign, that the principle of nullity rested on no authority but the will of the paternal despots of Rome; that it was a restriction upon the divine law and liberty of marriage; that it was certainly not countenanced, if it was not counteracted, by the law of God; that its direct operation was to harden the heart, and to eradicate every kindly affection; George the Third was too good, too wise, too religious, to lend the proposition the sanction of his assent for a moment. Every censure which is due to the nugatory marriage of minors may be applied to royal marriages, voided under the same authority; and these are reflexions which men who are anxious for the honour of the court will be cautious of inviting. The remote consequences of this inconsiderate measure may involve a disputed succession, and the feelings of the country may be distracted upon the failure of the legal and legitimate issue of George II. between the necessity of resort-

[c] 12 Geo. III. c. xi. s. 1.

ing to a foreign line, in conformity with the Act of Settlement, and the elevation to the throne of what the law has pronounced the issue of a royal concubine. The law itself contemplates the divisions of the Royal Family in making provision for the marriage of a prince or a princess, who, after attaining the age of twenty-five years, "shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the king:" but is it expedient to bring these differences before the public; to shew the prince in opposition to the king, and the king in opposition to the prince; to inflame the zeal of partizans, and to engage the Houses of Parliament in the private quarrels of the court? What would be the issue, if the two Houses should not concur in disapproving a marriage proposed to the council; if the one House should silently approve the proposition to which the other should avow its dissent? If, when the sovereign was known to disapprove the union, the Houses of Parliament should make the inclinations of a public favourite the means of offence to an unpopular sovereign, or in the caprice of political favour allow the marriage, by not disapproving it, and then withhold the means of support? And is it quite comely or consistent with the preamble, which declares, that "the kings of the realm have ever been entrusted with the care and approbation" of the royal marriages, to make the Houses of Parliament instrumental under any circumstances in concerting a marriage to which the king has refused his sanction? These also are questions of political expedience, which should be weighed deeply in the minds of men who would sustain the true dignity of

the Royal Family, and throw over their private transactions a veil of mysterious majesty, which might conceal the frailties and follies of exalted station from the rude gaze of malignant envy or idle curiosity.

The Act quickly followed the marriage of the Duke of Gloucester into the House of Waldegrave; and it might be thought expedient to prevent the recurrence of that precedent, although there was certainly nothing in the issue of that marriage which called for censure, or which could justify the nullity of similar marriages. Whatever may be the policy of separating the court from the people, and of preventing the secret influence or too intimate association of particular families, there are relations in life in which the peasant and the prince are bound by the same authority, and placed under the same obligations. Marriage is one of these relations, by which the sovereign, as well as the meanest of his subjects, is or is not bound: and if there is no principle upon which the one may claim the benefit or suffer the wrong of nullity, neither has the other any exemption or immunity. When Doctor Johnson declared his disapprobation of the royal Marriage Act, he justified his objections by saying, "Because I would not have the people think, that the validity of marriage depends on the will of man, or that the right of a king depends on the will of man. I should not have been against making the marriage of any of the Royal Family without the approbation of King and Parliament highly criminal[d]." He should rather

[d] Boswell's Life; the year 1772.

have said, highly *penal;* for there is no crime in marriage: but the legislature, although it cannot alter the nature of right and wrong, is concerned in regulating the law of property, and may certainly circumscribe and restrict the civil effects of marriage; and now that the principle of nullity is rescinded, and better penalties are substituted for the offence of marrying a minor without consent, it might be sufficient to enact, that the disapproved or unauthorized marriage of a prince should be followed by a forfeiture of the right to the throne. The issue of the marriage would thus sink to a level with the family into which it might please the royal parent to transfer himself, and, however detached from the royal line by the act of his parent, he would be capable of the most honourable and virtuous associations. There would be no taint of bastardy upon the child to disgrace the noblest pedigree: the royal parent would feel the weight of his conjugal and parental responsibility, and be exemplary in the discharge of its obligations: and no forfeiture would be incurred which would not equally result under the existing law from the marriage of an English prince with a papist. The marriage would be affirmed: the title to the throne would be void.

The Act has different operations upon the sons and the daughters of the sovereign. If a prince shall marry in contravention of the law, his marriage is simply void; the persons who connive in his marriage are liable to certain penalties; his wife is dishonoured; his children are degraded; as long as he takes an honourable interest in the engagement which he has contracted, he suffers the deepest

anguish in perceiving the precarious and untenable relation of his wife and his children; but the volatile passions of youth are under no legal restraint or obligation; he may burst his bonds and cast his cords away at his discretion; he is free to abandon the wife of his youth and the child of his first affection; and, however honour and conscience may restrain him, political advantage may seduce him to take advantage of the nullifying statute, which he cannot amend, and to marry whom he will with consent of the Crown, or without the dissent of Parliament.

This is the effect of political expedience upon the marriage of a prince: what is the operation of the same law upon the marriage of a princess under the same circumstances? If the Princess Royal should be clandestinely married to a subject, the effect would involve something more than nullity; the violation of her person is an act of treason. The marriage of the other princesses would be simply void; but it would require more than ordinary ingenuity to reconcile the nullity of the marriage, and the unavoidable consequence of the nullity with political expedience. If this should be called an extreme and improbable case, let the attention be fixed on the case which is contemplated in the Act, that a marriage is proposed by a princess under the age of twenty-five years, and disapproved by the Crown; and that the same marriage, after a period, is in due form submitted to the Council, and through the Council to the Parliament: if the marriage is disapproved, will the disapprobation be met by no opposing considerations; or will the prevailing wishes of the princess be exposed to no animadver-

sions? Is it the condition of a princess to be never emancipated? Is she exempted from the natural affections of her kind; or must they be held in subjection to the abstract notions which others entertain of political expedience, which she does not apprehend, and in which she takes no interest or concern? Or, without being required to take the veil and vow of chastity, or permitted to entertain the views of power to which even a solitary may aspire, must the British princess alone be deprived of the liberty of marriage, and of the independence, the authority, the maternal affection, the condition of inspiring love, of loving and of being loved, which is the passion of the sex?

The heirs of the throne of England are precluded from intermarriage with Romanists, under pain of forfeiting the royal inheritance: and this restriction separates them from all the southern courts of Europe, from France, Spain, Portugal, Naples and the Italian states, Austria, and Saxony. Prussia and some of the German courts, Holland, and the Northern States, are alone open to their addresses. The princes may visit these courts and seek alliances for themselves; but the princesses have only the chance of a casual acquaintance before they are transferred as the seals and pledges of a treaty of political expedience: and notwithstanding the contrary example which has been exhibited in a long and virtuous reign, there is no presumption in asserting that such alliances do not promise to fulfil the end and design of marriage; and that while marriages thus contracted on a principle of abstract interest, without any community of heart and mind,

deserve to be viewed with the most delicate forbearance, they are not the marriages which political or moral expedience recommends to be exhibited to the gaze of nations. It is not however the effect of these marriages, but the right of nullity, which is the proper subject of the present discussion, a right which in this application claims no better foundation than political expedience; an expedience very doubtful both in its principles and its effects, irreconcileable with the nature and freedom of marriage, an isolated anomaly in the English law, and derogatory to the honour and good faith which are demanded in all the transactions of a British prince. The Act has borne the trial of half a century; in a single instance only has it operated in positive nullity; the benefits which the terror of the law has produced are at least unequivocal or unknown.

The Act restrains the inclinations of the Royal Family, by nullifying any marriages which they may contract in violation of the specified conditions, and rendering the issue incapable of any inheritance, either from the royal parent or from the family into which he may transfer himself: but it does not preclude their marriage, it does not impose the absolute necessity of celibacy, or offer any temptation to a debauched and vicious practice. Thousands of men and women in every station of life are restrained by circumstances from marrying, whose characters are nevertheless clear from every stain of impurity. While the provisions of the royal Marriage Act continue in force, and the persons most interested "feel the hardship of being unable to contract such marriages as their inclination might lead them to

form, they should recollect, first, the principle of the prohibition, the sacrifice of individual convenience to general good," or what is supposed to be general good, "deducing the wisdom and necessity of it from those melancholy pages of our history which exhibit the destructive consequences of the civil contentions which divided the royal houses of York and Lancaster, and deluged the kingdom with blood: and secondly, that from the situation which imposes such hardships, adequate advantages arise; the comforts of affluence, without exertion of body or mind; rank, dignity, and consideration, without any previous effort to obtain them; and exclusive privileges, without the necessity of personal qualifications: and thirdly, they should recollect, that no human law whatever can afford an excuse for the violation of a divine precept[e]."

There is another statute, 6 Henry VI. which prohibits the marriage of a queen dowager without the consent and licence of the king. The occasion of passing this statute was the marriage of Catherine, mother of Henry VI. with Owen Tudor, a private gentleman; and the reason which is assigned for the law is, "because the disparagement of the queen shall give greater comfort and example to the ladies of estate, who are of the blood royal, more lightly to disparage themselves[f]." Disparagement was then the principle of prohibition. The Jewish doctors had as good reason for asserting, that the wife of a king was too exalted to be the wife of a subject. Other widows are free to marry whom they will; a queen

[e] Antijac. Rev. vol. vi. p. 209. [f] 1 Bl. Com. c. 4.

dowager only is subject to the will of the heir of her lord.

There are other circumstances under which the political expedience, which regulates the marriages of the Royal Family, betrays the most singular inconsistency. To violate or defile the queen consort is an act of treason, as well in the person committing the act as in the queen herself if consenting. But if the adulterer be an alien, owing no allegiance to the sovereign, he is not responsible for the treason; and the queen, being an accessary, is exempt from trial, by the irresponsibility of the principal: and yet the adultery of the queen, and the interest of the state in her purity, and the consequences of her infidelity, whether with a foreigner or a subject, are the same in respect of the taint and suspicion thrown upon the royal progeny. It is the danger to the royal issue which constitutes the treasonable offence, and therefore, the violation of a queen dowager, and the adultery of the husband of a queen regnant, are exempt from the charge of treason, because they do not affect the royal lineage.

Again, to violate the chastity of the consort of the Prince of Wales, or heir apparent to the throne, or of the Princess Royal or eldest daughter of the king, is an act of treason, on the principle that the Prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy, and the eldest daughter of the king is alone inheritable to the crown on failure of issue male: but it is an obvious remark upon this statute, that it perhaps was not meant to be extended to the Princess Royal when she had younger brothers living; for the

issue of their wives must inherit the crown before the issue of the Princess Royal, yet their chastity is not protected by the statute.

In all the subtlety which converts adultery into treason, and defines the treason at one time by the duty to the king, at another by the danger to his issue; in all the expedience which professes, not only to restrain the inclinations of the Royal Family, but to nullify the marriage which is not conformable to its rules; it is not impossible that the wisdom of the politician may have been deceived, and may have been subject to the common faults and oversights of human nature, in the maintenance of positions which the moralist cannot approve, and the tendency of practices which the enlightened wisdom of the legislature may not scruple to examine, and to reduce to a more just conformity with the manly, rational, and religious spirit of the English law.

CHAPTER IV.

RECIPROCAL DUTIES OF HUSBANDS AND WIVES.

THE divine institution of marriage; the perfect innocence of the age in which it was ordained; the holy purposes which it is designed to accomplish; the mysterious union between Christ and his Church, which it has been made to represent; the divine presence and beginning of miracles with which its feast was honoured in Cana of Galilee; and the religious solemnities with which it has been ratified in all ages and in all countries; combine in throwing a peculiar sanctity round the state of matrimony, and in rendering it worthy of the honour of all men. The sublimest and most elevated views of the dignity of marriage may all be reduced into motives of practical improvement; and there is no sanction which can be conceived to enforce the obligations of conjugal duty, which may not be brought into action in the most ordinary course of wedded life, spent in conformity with the divine instructions, in a due consideration of the ends for which matrimony was ordained, and a conscientious obedience to the rules by which the virtue and the peace of domestic life may be promoted and fulfilled. "Whence," says the eloquent Tertullian, "whence shall I be able to declare the happiness of that marriage which the Church conciliates and the oblation confirms, of which angels announce the seal, and which the Father ratifies? For even on earth sons do not

rightly and lawfully marry without consent of their fathers. What then should be the yoke of two believers, of one hope, of one discipline, of the same service? both brethren, both fellow-servants, without any distinction of spirit or of flesh? They, however, are truly two in one flesh, where being one flesh they are also one spirit. Together they pray; together they prostrate themselves; and together they keep their fasts; guiding one another, exhorting one another. As in the Church of God, so it is in the marriage of God: as in anguish, so in refreshment and relief; neither conceals any thing from the other; neither avoids the presence of the other; neither is troublesome to the other; freely by them is the sick man visited, and the poor man sustained. There is no pang in giving alms; there is no scruple in offering sacrifice; there is no obstruction to daily diligence: there is no surreptitious sealing; no trembling gratulation; no silent benediction. Psalms and hymns resound from the one to the other; and their mutual challenge is, which shall excel in singing to his God. Christ rejoices in seeing and hearing such things, and sends upon them his own peace: where the two are, there is He; and where He is, there the wicked one is not[a]."

The duty of husbands, as it is set forth in the Scriptures of heavenly truth, is to love their wives as they love themselves: to be not bitter against them; to dwell with them according to knowledge; giving honour unto the wife as unto the weaker vessel; and as being heirs together of the grace of

[a] Ad Ux. l. ii. s. 9.

life, that their prayers may not be hindered[b]. These apostolical precepts require of the husband the strictest and most constant affection; the suppression of all moroseness; the control of every churlish humour; a cohabitation with the wife, conducted with knowledge, discretion, and reverence, in consideration of their eternal inheritance, and the acceptance of their mutual prayers. It is in a just conformity with these precepts that every English husband pledges himself to live together with his wedded wife, after God's ordinance, in the holy estate of matrimony: to love her, comfort her, honour and keep her in sickness and in health; and forsaking all other, to keep him only unto her, as long as they both shall live: he takes his wedded wife, under all the varieties of human character and condition, for better for worse, for richer for poorer, in sickness and in health; to love and cherish her until death shall part them. This engagement of the husband implies unwearied affection, consolation in trouble, honour and reverence, maintenance, care, and constant fidelity.

The engagements and the duties of wives are not less plain or easy to be understood. They are required to submit themselves to their own husbands as unto the Lord; to be subject to them in every thing; to reverence them; to win them even to the love of the truth by the purity and modesty of their conduct, being adorned with the incorruptible ornament of a meek and quiet spirit, which in the sight

[b] Eph. v. 28, 33. Col. iii. 19. 1 Pet. iii. 7.

of God is of the highest value[c]. It is in correspondence with these sacred instructions, which require submission, reverence, conciliatory demeanour, exhibited in all meekness and quietness, that the English wife engages to live together with her wedded husband, after God's ordinance, in the holy estate of matrimony; to obey him, serve him, love, honour, and keep him, in sickness and in health; and forsaking all other, to keep her only unto him, so long as they both shall live: to have and to hold him for better for worse, for richer for poorer, in sickness and in health; to love, cherish, and obey him, till death shall part them. The vow of the wife is in perfect harmony with that of the husband, implying, with the addition of obedience, affection, honour, care, and maintenance, according to her power, with uninterrupted constancy and fidelity.

These vows of marriage are constructed in terms of the most exact reciprocity. Not only do the husband and the wife pledge themselves to the performance of the duties appropriate to each, and bind themselves by a covenant of mutual stipulation, to render one service in return for another; but the engagement is in many cases precisely the same, involving the same love, the same honour, the same maintenance and care, the same forsaking of all other, the same constant affection of each to the other, in the same circumstances, and for the same period. There is no distinction but that which is inseparable from the distinction of the sexes, in the

[c] Eph. v. 22, 24, 33. 1 Pet. iii. 1—4.

force of which, if the woman is required to defer to the will of her husband, there is a compensation of that deference in the consolation in trouble, the protection in danger, the instruction, persuasion, and advice in difficulty, which she is entitled to demand and receive. Each should be faithful to the other; or rather, the wife should learn a lesson of chastity from the husband's virtue, (which may include every kind of moderation.) It would be unjust in the man to demand that virtue of another which he is not himself able to observe: for the husband is the head of the wife; and when she lives more virtuously than her husband, the house hangs as it were with its head downwards. The husband should therefore take the lead in all good works, because he is the head, that his wife may imitate and follow him, as the body follows the head, and as the Church follows Christ[d]. The wife, says Chrysostom, is a secondary chief, and should not claim equal honour with her husband, for she is under the head: nor should the husband hold her in contempt, as if she were subject unto him, for she is the body; and if the head despise the body, it shall perish[e]. It has been of old the condition of woman, that her desire should be subject to the will of her husband, and that he should rule over her[f]: and this subordination of the sexes is recognized, not only in the formulary, which exacts of the woman the duty of obedience, but in those principles of English law which attach the guilt of treason to the woman who murders her

[d] Isidor. de Div. Off. l. ii. c. 19. [e] Hom. xx. in Ep. ad Ephes. apud Gerhard. [f] Gen. iii. 16.

husband, to whom, as her lord, she owes allegiance; and render her irresponsible for offences committed in his company, on the hypothesis that they are committed under his authority and control.

The golden rule of Christianity requires of its disciples to do unto others as they wish that others should do unto them: and the great principle from which the apostle proceeds to the recommendation of the relative duties is the submission of one to another in the fear of God[g]. In the strict communion of married life, in which there is not only a reciprocal obligation, hardly varied by the distinct condition of the sexes, but in which, in the energetic language of inspiration, the man cleaves unto his wife, and they become one flesh[h], this principle is of the highest value and importance. In the equal condition of the husband and the wife mutual submission and mutual reverence form the virtue and the happiness of conjugal life, and the infringement of them its crime, its misery, and its shame. In this union of persons one and the same object and end should be set before the man and the woman[i]. There should be an unity of purpose, of pursuits, of affections, and desires, without which the singleness of the conjugal relation must be broken and destroyed. Each should consider the other as another self, morally and mystically incorporated by an union which death only can dissolve, and practically consolidated in the parentage of a common offspring. It is no metaphorical or unnatural representation of Chris-

[g] Ephes. v. 21. [h] Gen. ii. 24. [i] Clem. Al. Strom. l. iv. s. 20.

tian duty which requires of husbands that they shall love their wives as their own bodies: He that loveth his wife loveth himself: for no man ever yet hated his own flesh, but nourisheth and cherisheth it, even as the Lord the Church; for we are members of his body, of his flesh, and of his bones. For this cause shall a man leave his father and his mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery; but I speak concerning Christ and his Church: nevertheless let every one of you in particular so love his wife even as himself[k]. It is in perfect accordance with this scriptural authority that the union of persons in marriage is so strictly maintained under the law of England, that the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband; that she does every thing under his wing or *cover;* that her rights merge in those of her husband; that her responsibility devolves upon him; that she can bring no action for redress of wrongs but in her husband's name and with his concurrence; nor be herself sued without making the husband a defendant: the principle also upon which they are precluded from bearing witness for each other is, that no man may be witness in his own cause; nor may they testify against each other, because no man is bound to accuse himself[l]. But, whatever be the doctrine or the law, can this personal unity of marriage be supposed to subsist, in fact, where the hearts and minds are distracted and at

[k] Ephes. v. 28—33. [l] 1 Blackstone, c. 15.

variance; where each pursues a separate object; where various and incompatible friendships are contracted; where there is a perpetual conflict in the pleasures and business of life; where, in the privacy of domestic intercourse, instead of the mutual confidence which becomes a personal union, there is distrust on the one side, and reserve on the other; here jealousy, and there susceptibility of offence? If the whole force of friendship consists in the supreme agreement of desires, pursuits, and sentiments, the union of marriage, which is the most intimate and unreserved of all friendship, should proscribe all secrecy and concealment, which the one is not bound to maintain, and the other is not concerned to penetrate; all distraction of interests and affections, which are incompatible with the strictest unity; all collision of opinions and sentiments, which one and the same mind cannot entertain. The unity of marriage, if it has any practical existence, is that oneness of mind, of heart, and of soul, which alone corresponds with the original identity of the sexes, before the woman was taken out of the man, bone from his bone, and flesh from his flesh, to be an help meet for him. It is only when there is unanimity and harmony of the husband toward the wife, of the one as chief, and the other acting in obedience to the precept, He shall rule over thee, that it can be truly said of them, that they are no more two[m].

There is a community of interest subsisting between the husband and the wife which should constitute an unfailing motive to the discharge of the

[m] Origen. Com. in Matth. tom. xiv. s. 16.

reciprocal duties of the married state. In conveying, as it were, their persons to each other, beyond the power of reclaiming them, or making any new disposition of them, and in putting themselves into a condition in which they may grow into one flesh, there is nothing of external circumstances which they can be supposed to reserve. The ancients were not unmindful of the unlimited confidence which the husband in his marriage reposed in his wife, and they expressed it in the forms of marriage, in which they included the delivery of the bridegroom's keys to the bride[n]; (and the taking back of the keys was equivalent to a message of divorce;) and in the form of betrothing, in which they severally agreed the man to be Caius, where the woman was Caia; the woman to be Caia, where the man was Caius[o]; intimating that in whatever respects the man was master, the woman should be mistress; a form of which the traces may yet be perceived in the custom of the woman's taking the name and title of her husband. These acts were designed to denote the commitment to the woman of the superintendence of the family, and the entire management of domestic concerns. The common participation of the same fortune, whether of riches or of poverty, was held to be most agreeable to nature, which requires, that in the changes and chances of life the husband should be the partner of the wife, and the wife of the husband[p]: and it is a beautiful picture which the historian has drawn of the condition of the Roman

[n] Brisson de Rit. Nupt. A. Hotman de Vet. Rit. Nupt. c. 10.
[o] A. Hotman, ibid. c. 16. [p] Ulpian: apud Hotman.

wife, that by her discretion, and the constancy of her submission to her husband, she was the mistress of the house in the same manner as her husband was the master; that when he died she was the heir of his property, as a daughter of a father's; that if he died childless and intestate she became the mistress of all which he left; that if he left issue she was entitled to an equal portion with the children[q]. Plutarch also maintains the necessity of the goods of the wife belonging to the husband, and those of the husband to the wife[r]; and, in the practical operation of this reciprocity of interest, married persons were incapable of making presents to each other, and it was held, that no judgment could be pronounced on the wife for subtracting her husband's goods, of which the society of life had made her a mistress[s]; there was no sign of any division in the house, there was nothing which the husband could appropriate to himself, or the wife to herself; their property was consecrated by both in common; and the sedulity of the mistress was exerted with an equal care of industry with the more active employments of the man in the forum[t]. In the same manner the Christian wife is said in an ancient form of espousals to have conveyed all her substance and her whole dower to her husband, and to have thrown it into his hands with strong affection, saying, I have nothing of my own; my goods are thine, the dower is thine, even my soul and my body are thine[u].

[q] Dion. Halicarn. apud Hotman. [r] Plut. ἐν αἰτίοις apud Brisson. [s] Brisson de Vet. Rit. Nupt. [t] A. Hotman de Vet. Rit. Nupt. c. 26. [u] Macarii Homil. xxxii. apud Hotman.

The English wife is equally the partner of her husband's fortune, whether of richer or of poorer; they bear the same name and the same title; they are so consolidated that they have no power of making a separate agreement; the wife's fortune so entirely devolves upon the man, that nothing is reserved but by the interposition of trustees; they are equally elevated by prosperity, and depressed by adversity; the husband's fortune is the rule of the wife's maintenance; the wife's fortune is liable to the husband's debts; the husband is responsible for debts contracted by the wife; the widow is entitled to a portion of the husband's estate; and the separate inheritance of each is united in a common offspring. This common condition is the principle of many reciprocal obligations. In the giddy elevation of prosperity it calls upon both to have a holy jealousy of character, that the dishonour of the one may not tarnish the fair name and reputation of the other; to beware of dissipation and ruinous excess, and to pay a prudent attention to means and circumstances, not more with a view to their private interests, than in a generous consideration, that the embarrassments of the husband are fatal to the comforts of the wife, and that the wife cannot indulge an extravagant passion for display without involving the credit, the independence, and it may be the personal liberty, of the husband. In the condition of life which requires mutual exertion, the industry of the one or the circumspection of the other will be vain by itself; they must be combined to promote success, and to avert calamity: in the time of trial and adversity, the considerate forbearance, the manly fortitude, the consola-

tory kindness of the husband, should be encouraged by the patient and cheerful resignation of the wife. Bound together in all the changes and chances of human condition, their tears and their smiles, their sorrows and their joys, should be common: with the delicate influence of the mind upon the body, and the body upon the mind, their best energies should be exerted in furtherance of their common health and happiness: each should comfort the other in his affliction; each should bear the burthens of the other, and lighten the load of human care and anxiety; each should labour sedulously to prosper the endeavours of the other. Such are the sympathies of wedded life; so strong is the association of mutual interest; so perfect is the affinity; so fine the distinction; that, like the tender organs of the sight, the one cannot be insensible of the injuries which the other receives; the one cannot be brought to act upon any object with more effect, than when it is aided by the cooperation of the other.

It is not in secular concerns only that there is a community of interest, and a reciprocity of duty; the apostle has directed the mutual care of husbands and of wives to higher objects, in representing them to be heirs together of the grace of life[x]. The heathens were not ignorant of this valuable principle. It was the wise institution of Romulus, that a wife married to a husband according to the sacred laws should be the partaker of all his goods and of his sacred rites. Hence marriage was defined to be the conjunction of divine and human law, and a wife

[x] 1 Peter iii. 7.

was called the partner of divine and human concerns[y]. The known effect of marriage in producing a coalition of religious rites and sentiments was the chief principle of the divine prohibition of the marriage of the Jews with the heathens, which was adopted into the laws of the primitive Church, in which the faithful were restrained from marrying with the unbelieving. If the wisdom of these restrictions be now called in question, and the expedience of reviving them be denied, it may nevertheless be permitted to assert the necessity of the most entire and cordial agreement in religious principles and professions between the husband and the wife. The spirit of controversy is but seldom in unison with the spirit of friendship; and when religious dissension is admitted into the private family, and an injudicious zeal is exerted in depreciating or maintaining a disputed faith, the natural result will be the destruction of domestic peace, or the compromise of religious truth. They who would be heirs together of the grace of life will hardly fulfil their duties to each other but by unreserved communication on the grand truths of their religion; by holding the same fundamental principles of moral practice; by following the same form of religious worship; by accompanying each other to the same house of prayer; and by joining in the same common acts of devotion, in their closets, in their families, and in the church. In the participation of a common faith and a common hope they will find

[y] Brisson de Rit. Nupt. Dion. Hal. l. ii. Modestin. l. i. Julian; and other authorities quoted by Brisson.

principles and rules of restraining the lust of the flesh, the lust of the eyes, and the pride of life; they will have common motives of consolation in the hour of trial and adversity; they will be prepared for the great work of instructing their children and households; and they will have no occasion to resort to that accommodation of principles which has been sometimes attempted, and which either in itself is a disguised indifference, or must produce jealousy and offence at the mode adopted in the religious education of the children of either sex. Such compromises prepare the way for the division and separation of families, and cannot be obligatory upon parents, if they believe the truth themselves; if they desire their children to be instructed in the truth; if they are persuaded of the Christian duty of contending for the truth; and of the necessity of a knowledge of the truth to the salvation of the soul[z]. One end of the divine institution of marriage, says the pious and excellent Gerhard[a], is, to be a help not only in human but divine affairs; and married persons will perceive, that its primary rule requires of them to render mutual aid to each other in the worship and service of God, and in all religious obedience, by precept; by example; by mutual exhortations to piety; by the confession with one heart of a true faith; by praying with one mouth to God; by combining their prayers; by the pious agreement of the two in whatever they desire to obtain; by reading

[z] Leslie, Of Marriage in different Communions; preface: prosecuted by Dodwell, s. 48—52.

[a] De Conjugio, s. 447.

and meditation in the Scriptures; by training their households in piety and virtue; by building to themselves a church in their own house; and by the daily observance of religious offices. It is thus that they should give themselves up unto prayer; that they should promote each the salvation of the other; that they should win each other to the belief of the truth, and cherish and confirm their common faith. It is thus that they should please each the other to his edification, and consider each other for the provocation and excitement of love and good works. It is thus that they should exert themselves, and encourage each other, in such constancy of religious duty that their prayers may not be hindered; and it will increase the force of their reciprocal obligations to remember, that the conjugal duties and interests are not bounded by time, but are regulated by principles, and directed to objects, which should govern the heirs of the grace of life.

The great end for which matrimony was ordained is the mutual society, help, and comfort that the one ought to have of the other, both in prosperity and adversity. When God saw that it was not good that the man should be alone, his wisdom and his mercy provided an help meet for him[b], to whom he might cleave, and with whom he might be incorporated in one flesh. Thus, by the original law of the institution, cohabitation, in its widest and most extensive sense, was made the primary duty of marriage, and the neglect of this cohabitation defeats the great purpose of mutual society which it was

[b] Gen. ii. 18, 24.

ordained to produce. This view coincides with the considerate precept of the apostle: Defraud not one the other, except it be with consent for a time, that ye may give yourselves to fasting and prayer, and come together again[c]: and with the most ancient inference from this text, that marriage has its proper offices and duties, excelling in the Lord, and exhibited in the care of the wife and the children, and that the great object of him who would be perfect in marriage, is the domestic character of the union, requiring the provision of all things for the common family[d]. There may be many cases in which the separation of the parties for a time is unavoidable, and even necessary and expedient: but though the society be interrupted, the duty of help and comfort may never be remitted. In the wild sports of the savage tribes which hunt the desert, and in the passion and jealousy which fill the harem, there may be no rational apprehension of the mutual correspondence of the sexes: but "when men begin to disuse their ancient barbarous practices; when their attention is not wholly engrossed by the pursuit of military reputation; when they have made some progress in arts, and have attained to a proportional degree of refinement; they are necessarily led to place a value upon those female accomplishments and virtues, which have so much influence upon every species of improvement, and which contribute in so many different ways to multiply the comforts of life. In this situation the women become neither the slaves nor the idols of the other sex, but the friends and

[c] 1 Cor. vii. 5. [d] Cl. Alex. Strom. l. iii. s. 12.

companions. The wife obtains that rank and station which appears most agreeable to reason, being suited to her character and talents. Loaded by nature with the first and most immediate concern in rearing and maintaining the children, she is endowed with such dispositions as fit her for the discharge of this important duty, and is at the same time particularly qualified for all such employments as require skill and dexterity more than strength, which are so necessary in the interior management of the family. Possessed of peculiar delicacy and sensibility, whether derived from original constitution, or from her way of life, she is capable of securing the esteem and affection of her husband, by dividing his cares, by sharing his joys, and by soothing his misfortunes[e]."

The different avocations and the different duties of the sexes will offer continual occasions of separation, and there are comparatively but few stations of life in which the help which the one should render to the other is not rendered in distinct and different places. The husbandman, the soldier, the merchant, the lawyer, and the statesman, are all called from their own houses to the busy haunts of men, in which alone they can fulfil the duties of their station, and advance the interest of themselves and of their families. The lot of women has been cast in a different mould: they are happily exempted from the

[e] Millar's Essay on the Origin of Ranks, p. 89. This ingenious and excellent Essay traces in distinct chapters the estimation in which women are held, in savage life, in the pastoral state, and under the improvements of agriculture and manufactures, and the refinements of opulence.

tumults of worldly strife; their modesty shuns the public gaze; their care is employed upon the arrangements of domestic economy, upon the wise administration of means provided by the more active energies of the husband, and upon the accumulation of all those delights which not the schoolboy's anticipation only, but the manly sense of Englishmen, comprehends under the name of *home*, and which are strongly contrasted with the heartless ceremony to which the term has been prostituted in the vocabulary of fashion. There is a peculiar grace in the delineation of these duties of the wife, in the discourse ascribed to Roger Ascham, when, in reply to the proposition of Lady Jane Grey, that she would read to her husband, he is made to say, "Rather do thou walk with him, ride with him, play with him; be his faery, his page, his every thing that love and poetry have invented: but watch him well; sport with his fancies; turn them about like the ringlets round his cheek: and if ever he meditates on power, go, toss up thy baby to his brow, and bring back his thoughts into his heart by the music of thy discourse. Teach him to live unto God and unto thee, and he will discover that women, like the plants in woods, derive their softness and tenderness from the shade[f]."

It is with excellent sense and judgment that Chrysostom treats of the distinct but cooperative duties of the two sexes; arguing, that it is the one office of the woman to preserve the means which are collected, to take care of the resources, to superin-

[f] Landor's Imaginary Conversations, vol. ii.

tend the family. For God hath given her for this purpose, that she may assist us in these and other domestic concerns. For since public and private affairs are wont to distract our life, God, making a distinction of these, hath assigned to woman the government of the family, and to man all the business of the state, forensic matters, trials, councils, the command of armies, all public concerns. The woman cannot hurl the spear, or shoot the arrow; but she may take the shuttle, and weave the web, and manage all the concerns of the family. She cannot give an opinion in the council, but she may give advice at home; and she has often a better acquaintance with domestic duties than her husband. She cannot conduct public affairs well, but she can train her children, the chief of possessions, well. She can penetrate the designs of her maidens, and watch over the prudence of her servants, and give all security to her husband, and relieve him of all care by her attention to those things which it is neither honourable nor easy for the husband to undertake, however he may desire it. This is indeed the work of the care and wisdom of God, that the man, who is useful in more important affairs, should be inferior and useless in those of a more trifling nature, that there may be a necessity for the offices of the woman: for if man had been equal to both public and private duties, the female sex would have fallen into contempt: and again, if the greater and more useful office had been assigned to the woman, God had filled her mind with arrogance. Therefore he assigned not both duties to one, that the other might not be depreciated and appear to be unnecessary;

nor did he distribute the two offices in equal proportion to each, lest there should be a contest and ambition of equal honour, and that the women might not contend that they are worthy of the same pre-eminence with the men: but having a care of peace, and preserving to each the rank which is due, he hath made in our life a distinction of public and private duties, and hath given to man what is more necessary and more useful, and hath assigned to woman the inferior part; that the one, on account of the necessity of his office, may be very highly respected, and that the other, on account of the inferiority of her office, may not rise against her husband. Knowing these things, let us seek no more than virtue of mind and nobility of manners, that we may enjoy peace, that we may have perpetual luxury in unanimity and love[g].

It is when the husband returns from the toils and anxieties of an useful but laborious day, that he seeks, in the quiet order of his family, and in the conversation of his wife, a society, help, and comfort, an interval of rest and repose, a refreshment of exhausted nature, an exhilaration of the wearied spirit, and a stimulus to renewed exertions in the contentions of a busy and an angry world: he seeks the solace of a companion, with whom he may freely communicate on his most important interests; who bears with him the burthen of a common parentage, and is anxious for the welfare of a common offspring; who will enter into his strongest feelings; whose fascinating vivacity may dissipate the labour-

[g] Eclog. lii. ex Johan. Chrysostom. ed. Matthæi, p. 88.

ing passions of his mind; whose softness may soothe the brow of care; and whose unsophisticated worth may challenge and reward the most strenuous and indefatigable exertion. It was with this view that the Roman orator put the question, "What is more honourable than the solace which a wife affords (*uxorium levamentum*) when men return from war[h]," or from any service of care and difficulty? But if home be deficient in society, help, and comfort, if the wife be indifferent or averse to the preparation or enjoyment of domestic bliss, it is but natural that the man should contract an abhorrence of home, and that he should seek his pleasure as he pursues his business, at a distance from its threshold. The frequent abuse of this domestic alienation might alone be brought in proof of the advantage of mutual cohabitation; and as the absence of friends is but too often fatal to the continuance of friendship, and their frequent association and unrestricted converse is most favourable to its confirmation and improvement, so if there be but a cohabitation of them that are married and bound together in the closest and most intimate of all friendship, it is hardly possible that their minds and tastes, their tempers, affections, and wills, should not be formed into a holy resemblance and conformity. In the degraded and secluded condition of women in heathen and Mahometan countries, there are but faint traces of the mutual society, help, and comfort, that the one ought to have of the other; there is no intercourse of mind with mind; there is no common principle

[h] Tac. Ann. l. iii. s. 34.

of friendship; no sense of reciprocal obligation; no perception of mutual interest; no dependence of the one upon the other. May the marriages of a Christian country never be conducted so as to produce the same effects; where the husband is known only as the master, and the wife as the mistress of the family; where except upon occasion they are seldom seen together; where the separation which necessarily follows from the difference of occupations is not compensated by the more rigorous devotion to the duties of domestic life. The happiness of the married state is not more destroyed by open contention than it is sapped and undermined by the apathy, the indifference, and the aversion, which result from the want of constant and unreserved communication, and the cultivation of a common feeling and a common interest. When the means are neglected the end is naturally disappointed; and if it was foreseen by infinite wisdom that it was not good for man to be alone, and a remedy was provided for the solace and alleviation of his solitude, his interest in the provision, and his gratitude for the benefit, require that he should appropriate the blessing to himself, by cleaving unto his wife, and becoming one with her.

The observations of an old writer[1] upon the co-operation and mutual interest of the husband and the wife, are so excellent, that no apology will be required for reciting their substance. Our nature, he observes, inclines us to society; and experience teacheth us, that a companion makes adversity more

[1] Comber, Off. of Matr. partit. i. sect. 1. s. 8.

tolerable, and prosperity more sweet; and God therefore created the woman and joined her to the man, that they might mutually help and assist each other, and unite their counsels and endeavours for the common good. If therefore we make a prudent choice, we shall find a mighty advantage in a discreet, virtuous, and affectionate relative; for so we double all our powers and capacities to promote our own good: the sacred bond of friendship derives all its usefulness and esteem from this, that it combines two hearts, and conjoins two heads, for carrying on the mutual interest of both parties: and therefore marriage must needs be highly beneficial and hugely valuable, which makes the nearest union of all sorts of friendship; there being no friends so closely and inseparably linked together; none whose concerns and interests are so entirely the same; none that must so necessarily share in the varieties of each other's fortune as the man and wife must do: so that if they do consider, none should love like these; none should be so unanimous in their designs and actions, none so zealous for each other's good, as the married pair should be; and if they be so, none have better opportunities to advance a joint interest than they. It is said of married persons, that they see with four eyes, and hear with as many ears, and work with as many hands: it being true of such a couple which Ovid feigns of the eyes of Argus, that one ever supplies the cessations of the other: when one is weary the other can labour; when one is absent the other is present; when one is sick the other is healthful, and able to attend and make provision. And doubtless it is not easy to determine,

whether it be a greater pleasure or advantage to have a prudent counsellor in our doubts, a faithful concealer of our secrets, a compassionate comforter in our sorrows, and a loving sharer in our joys: such relatives are sometimes so necessary, often so comfortable, and always so useful, that they can scarce be happy that are without them; and none can tell the felicity of such an enjoyment but those whom Providence hath blessed with such a choice: which consideration should engage all married persons for their own sakes to resolve to be such mutual helps and comforts to one another; they should lay aside all their little private ends, and esteem themselves but one half of themselves; espousing one common interest, and believing the body can never be well while the one half only is provided for: they should be as ready to assist each other as the one hand is to help the other; for whatever is truly for the good of either party will redound to the profit of both at last. Finally, let us all admire the wisdom and goodness of Almighty God, in contriving so happy a conjunction, for so blessed an end: and whensoever we find the comfort and convenience of this mutual succour, let us bless his name for it, who deserves the glory of it for designing so useful a favour to the children of men, in this valley of misery and necessity, where our wants are so pressing and so many, that if we had not such society to cheer us, such help to aid us, and such comfort to support us, we should even sink under the burden of them.

It has been ordained, that in marriage the nearest and dearest of all natural relations shall be dissolved, and that for the sake of woman a man shall leave

his father and his mother, and cleave unto his wife. In making a transfer of the first affections, in leaving the house of the parent for the house of the consort, and in entering into a voluntary but irrevocable engagement, there is a necessity for the most anxious and deliberate circumspection. The desire of marriage should not be directed for a moment to an object upon which the affections cannot permanently rest; and the motive of plighted faith should not be a transitory passion, but a constant and settled principle, rooted in the heart and the understanding, and actuated by an earnest apprehension, not only of the present joy, but of the whole circumstances of the future life. "The condition of human life will not permit us to say, that no one can conscientiously marry who does not prefer the person at the altar to all other men or women in the world; but we can have no difficulty in pronouncing, (whether we respect the end of the institution, or the plain terms in which the contract is conceived,) that whoever is conscious, at the time of his marriage, of such a dislike of the woman he is about to marry, or of such a subsisting attachment to some other woman, that he cannot reasonably, nor does in fact, expect ever to entertain an affection for his future wife, is guilty, when he pronounces the marriage vow, of a direct and deliberate prevarication; and that, too, aggravated by the presence of those ideas of religion and of the supreme Being, which the place, the ritual, and the solemnity of the occasion, cannot fail of bringing to his thoughts. The same likewise of the woman. This charge must be imputed to all, who from mercenary motives marry the object of

their aversion and disgust: and likewise to those who desert, from any motive whatever, the object of their affection, and without being able to subdue that affection marry another[k]."

There may be other motives, which, although they are not mercenary, are nevertheless equally vicious in principle and mischievous in effect. In old time, the approved motives of choosing a husband were, his virtue, his descent, his person, and address; and a wife was recommended by her birth, her manners, and her beauty: and it has been the common and inveterate complaint of heathen and of Christian moralists, that wives have been chosen only for their riches or their beauty; for beauty, which tempts many lovers; or for riches, which attract a counterfeit love, and multiply the occasions of strife[l]. Comber pronounces the best motives in the choice of a wife to be "an honest extraction and virtuous education, piety and modesty, integrity and a good temper; we must choose one that we can love for themselves, if they were stript of all their accidental advantages; and then if there be any loss or abatement in the fortune afterwards, it will not abate our affections and duty to each other, nor deprive us of the comfort and satisfaction we have in each other: we may be richer or poorer, but that will make no variation in our love, if it were grounded on the more lasting and noble foundation of internal goodness[m]." The marriages which ap-

[k] Paley's Moral Philos. b. iii. pt. 3. c. 8. [l] Juvenal, Sat. iii. l. 140. Chrysostom, Eclog. lii. p. 90. Isidor. de Div. Off. l. ii. c. 19. [m] Comber, Off. of Matr. partit. ii. sect. ii. s. 5.

pear to offer the fairest promise of happiness, and to be most conducive to mutual society, help, and comfort, are those in which there is equal age, equal rank, equal fortune; affectionate attachment to the future relations, resulting from their worth; an agreeable person; congeniality of temper; an informed and regulated mind; and a correspondence of sentiment on the great subjects of religion and virtue: where there is no suspicion of avarice or ambition; no room for the reproach of poverty or mean descent; no jealousy of attentions shewn to an offensive kindred; no motive of future antipathy or aversion; no dissonance of pursuits; no apprehension of a tedious listlessness, or want of mental resources; no deliberate provision for the collision of opinions which cannot be reconciled. In the present condition of humanity, differences are inseparable from the course of wedded life; and there will be multiplied occasions for the exercise of forbearance. The best wisdom will be seen in the circumspection which shall be most effectual in preventing the occasions of offence, and preparing the ground for the most uninterrupted agreement.

The secondary end which the divine wisdom proposed in the institution of marriage, was the continuance of a godly seed, and the education of a righteous progeny: and "thus marriage becomes highly venerable, as it is the nursery of the Church, and the propagator of religion, and an estate, which, being rightly managed, doth evidently tend to the salvation of souls, and the increasing of the blessed

members of the heavenly choir[n]." In the fulfilment of this purpose the office of the parent enforces the duty of the consort, and confirms the necessity of a strict attention to the reciprocal obligations of domestic virtue. The first seeds of Christian knowledge are sown by the mother, in the earliest years of infancy; and whatever be the preparatory substitutes which the genius of fashion has invented for the indulgence of indolent luxury, or which have been accommodated to the exigencies of labouring poverty, there is nothing so natural or powerful as the assiduous tenderness and delicacy of a mother, in forming the mind of the infant into a holy conformity with the will of the heavenly Father; in inspiring his heart with the fear and love of God; in folding the hands and bending the knees to offer the sacrifice of the morning and the evening; and raising the hope of happiness above the sky. But although it is the peculiar office of the mother to open the affections and the understanding, and to give the first bias in favour of virtue and of truth, it is not enough that the father contributes to the support and maintenance of the child; it is incumbent on both the parents, and especially upon the father, to train their children in the nurture and admonition of the Lord[o], and to teach them, so soon as they shall be able to learn, the duties of their appointed station. The general order of nature has been alleged in proof of the necessary care of both the parents, and of their cohabitation, so long as it is required for the pro-

[n] Comber, Off. of Matr. partit. i. sect. 1. s. 6. [o] Ephes. vi. 4.

tection of the offspring: and it is the lesson of daily experience, that the assiduities of the woman should be encouraged and supported, not by the distant approbation, but by the cordial cooperation, of the man; and that the fear of a father's authority should be added to the grace of a mother's love. In the performance of these duties, in forming their children into the image of themselves and of each other, their own tempers will be harmonized, and they will experience a richness of domestic bliss, which the heartless formalities of ordinary society will not convey. The very cares and anxieties which they entertain for their common offspring, will soften their hearts into a mutual love and gratitude to each other; and when the transports of youthful passion have subsided, there will remain a lasting remembrance of benefits conferred upon their common offspring, and the cheerful hope of a common return for their several duties.

The wisdom of God's providence has been conspicuous, in ordaining the perpetuity and permanence of marriage, and requiring a continuous performance of the duties of the husband and the wife till death shall part them. The man shall cleave unto his wife, and they two shall be one flesh, indissolubly united. There is no relaxation of the principle of conjugal duty: although the temper shall alter for the better or the worse; though the circumstances shall change from richer to poorer; though the complexion, according to the old ritual, shall be varied, and be the fairer or the fouler. The old objection is briefly made and refuted in the words of Isidore[p]: What if

[p] De Div. Off. l. ii. c. 19.

she be barren, if she be deformed, if she be decrepit, if she be offensive, if she be drunken, if she be immoral, if she be luxurious, if she be a glutton, a simpleton, or a wanderer, or a scold, or abusive? She must be retained, whether with or against the will: whatever she was when she was taken she must be kept: for when you were free you voluntarily submitted yourself to the service. In all the changes and chances of human character and condition there is the same unabated obligation to give comfort in the time of trouble; to sustain the vigour of health; to cherish the infirmity of sickness and decay; and to relax in no part of duty until death shall put an end to the relation. We may use all circumspection in making the choice; we are free to choose the good and refuse the evil: but if our rashness and imprudence lead us into an evil choice, we have no liberty of changing or repentance, since no relation is or ought to be dissolved by the evil manners of the correlative. If our father or our master be an evil man, he remains our father or our master still: and the relation of the husband and the wife is not more dissoluble; in respect of which it was the proverb of the Jew, that we must gnaw the bone that falls to our lot, and be content with the wife that we have married. It was the wiser reasoning of the heathen, that the faults of a wife are to be taken away or to be borne: he that can take them away makes his wife better; he that bears them makes himself better. The Christian should be more circumspect in his choice than the heathen, because he binds himself to keep the covenant of marriage indissoluble, whether the person prove the better or the worse; and if he

is imprudent in his choice he should be the more patient in bearing the punishment of his folly[q]. When the ancient Egyptians, in their sacrifices of marriage, threw the bile of the victim under the altar, they meant to signify that there was no room for anger in the conjugal relation, in which kind affection should take the place of wrath, love of hatred, and human kindness of the gall of bitterness; in which the consorts should bear the common yoke with equal minds and accommodation to the manners of each other; in which, with all the energies of that charity which suffereth long and is kind, which is not easily provoked, which beareth all things and endureth all things, they should learn to be patient under the humours and infirmities of each other[r]. If marriage was not, in nature and in law, permanent, if it was subject to the caprices of human passion, it would be the most unstable of all acquaintance: there would be no patience of the first offence and the apprehension of its consequences: the disappointed hope of pleasure or of profit in marriage would be followed by immediate separation; there would be no provision for the education of children; there would be no maintenance for the infirmities, and no imperceptible acquiescence in the humours, of declining age. It is the consideration of the indissoluble permanence of the conjugal union which enforces the necessity of moulding the temper from the very beginning of matrimonial life, by uninterrupted converse and the most unwearied spirit of

[q] Comber, Off. of Matr. partit. ii. sect. 2. s. 5. [r] Gerhard, de Conjug. s. 448.

conciliation, that when the transports of passion have subsided, and the fascinating graces of early life have been impaired, there may still remain a disposition to mutual concessions; a ready acknowledgment of tried excellence, a cheerful forbearance and compassion of each under the infirmities of the other. It is an affecting scene, which is sometimes exhibited in the extremities of wedded life, when an aged couple, that have long borne the burthens of each other, are unable to contend with the last separation, and sink together into a common grave. It is a less mournful proof of virtuous constancy, which many have exhibited in imputing such obligation to their first love, as not to allow to themselves a liberty of entering upon a second marriage. The doctrine, notwithstanding its opposition to the permissive rule of the apostle, was commonly held in the primitive Church: and it has been carried also into the practice of savage life, without being restricted to the *suttees* of India. The women of ancient Germany took an husband, as they took one body and one life, not suffering their thoughts or their desires any larger licence, and restraining their love, as it were, not to the husband, but the marriage: and it is recorded of the Winedi, who were in other respects a most savage race of men, that they were so zealous in observing the mutual love of marriage, that the woman refused to survive her husband, and that she was commended who committed suicide, that the body of herself and her husband might be burned upon a common pile[s].

There is a reciprocity in the duties of wedded

[s] Tac. de Mor. Ger. s. 19. Brotier, Annot. ad loc.

life, dependent on the singleness of the union of the two into one flesh, which in practice should never be abated. It is not meant that the offences of the one will ever excuse the offences of the other, or that indifference or aversion, inconstancy or infidelity, can under any circumstances be worthy of pardon, or capable of defence. But when the conjugal duties are upon one side adequately discharged, a foundation is laid upon which the performance on the other part may be the more confidently demanded: and whenever they are neglected it is unreasonable to require the benefit which is not conferred. This is the ground of the doctrine of recrimination, under the most aggravated of offences, which operates not in the increase of crime, but in refutation of the plea of injury, and the pursuit of redress. If upon the one side there is constant affection and love, gentleness, modesty, rational compliance, respect, and reverence, the whole circle of a wife's duties to her husband, they form a ground upon which she may build her claim to protection, indulgence, honour, admiration, and all the virtues which a husband owes to his wife. But if the woman is loving and amiable, faithful and obedient to her husband, and in all quietness, sobriety, and peace, a follower of holy and godly matrons, what shame does she not accumulate upon the indifference, antipathy, and aversion, the fickleness and arbitrary tyranny of an unkind, an inconstant, and cruel husband? What provocation does he not offer to her to retaliate and resent the injuries which she sustains? And what is the justice of his complaint, what is his title to redress, if she inflicts the evils which she receives;

if she makes him in his turn to feel, if he has the sense to feel, "the worst of sorrow, and the worst of shame;" if she deprives him of benefits which his own conduct proves him unable to appreciate, and unworthy to possess? Or if the husband, in the punctual fulfilment of all his duties, meets with no return, or is incited by bad example to retaliate, can the woman complain, if she is neglected, insulted, abandoned, and despised? It is the excellent argument of Lactantius, that both should observe the pledge which they have severally given to each other, or rather, the wife should be taught a lesson of chastity by an example of continence. For it is unjust to demand of another what you yourself are not able to exhibit. This injustice has been the occasion of adultery, when women have been indignant in maintaining their fidelity to those who have been wanting in reciprocal affection: nor is there any woman so destitute of shame, as not to gloss over her vices with the pretence, that in her offence she does not commit, but only revenge, an injury. This is well expressed by Quintilian, when he says, that the man who does not abstain from the bed of another man is not the guardian of his own, for between these things there is a natural connexion. For the man who is engaged in debauching the wives of other men can have no leisure for preserving the sanctity of his own house; and the woman who falls into such a marriage is provoked by the example, and thinks how she may imitate her husband, or obtain redress for her wrongs. Caution is therefore necessary, that no occasion or pretext for vice may arise from our intemperance; that the manners of

the two may be accommodated by custom to each other; and that the yoke may be borne with equal minds. We should one in the other contemplate ourselves. For in this consists the sum of righteousness, in not doing to another what we are not willing that another should do unto us[t].

The general rule of Christian duty is especially appropriate to the state of matrimony, in which no man can deviate from the straight path of reciprocal obligation, without injury to his own interest; without danger to his own honour; without disparagement of his own affections; without destruction of his best and most substantial happiness. In the practice of inconstancy and unconcern, he deprives himself of all title to consolation, to compassion, and to redress, if he suffers wrong: and although he respects not himself, nor the redemption of the vow of his marriage, although the claims of the wife of his covenant are undervalued or renounced, let him think upon his children, whose Christian and virtuous education, the secondary end of marriage, is defeated, when their parents live not together in godly love and honesty, and the full possession of that mutual society, help, and comfort, which it is the great purpose of matrimony to produce. It is the sentiment of an unknown and anonymous writer, which in this respect is worthy of more authority than is due to the general character of his writings, and in which he professes to deliver the substance of the apostle's doctrine on the duty of marriage: I have taught wives to love their husbands, and to

[t] Lactant. Div. Inst. l. vi. c. 23.

fear them as their masters: I have taught husbands to keep their faith to their wives, as they desire by all means that modesty should be preserved for themselves: for whatever God, who is himself the Father and Founder of all things, punishes in an adulterous wife, he also punishes in an adulterous husband[u].

[u] Abdiæ Apostol. Hist. de S. Paulo, s. 7. apud Fabricium. Cod. Apocr. Nov. Test.

CHAPTER V.

THE SINFUL AND CRIMINAL CHARACTER OF ADULTERY.

THE degree of guilt which attaches to the offence of the adulterer cannot be justly ascertained without reverting to the nature of the contract of which adultery is the breach and violation. If marriage, as it is contemplated by some writers, be a civil contract, and nothing more, adultery, as the violation of that contract, may be thought a civil injury, and liable to the same redress as other civil injuries. A civil injury is properly the infringement or privation of the private or civil right of an individual, in respect of his person or property, under which he is entitled to recover by civil action the right and interest which he has lost, or to receive some compensation for the wrong which he has sustained. Thus by the civil law of Rome[a] simple theft was pronounced a civil injury, for which a man was entitled to obtain redress by civil action, and which under the Jewish law[b] also might be discharged by the payment of an equivalent. It is not unreasonable nor inconsistent with this view of the nature of civil injuries to suppose that the fine or compensation for adultery, considered as a civil injury, had originally respect to the manner in which the wife came into possession of the husband, and to the right and interest which the

[a] Gibbon's Rom. Emp. c. 44. [b] Exod. xxii. 1, 4. Lev. vi. 4. Prov. vi. 31.

man possessed in the woman at a time when the woman was held to be not a person but a thing; a thing which might be acquired by coemption, and any deficiency in the title to which might be supplied by use and possession for a year[c]. It was very consistent with this state of society, that the father of an adulteress should return the dower which the husband had as it were paid for the purchase of the wife, and that the adulterer should redeem himself from other penalties, by paying the price of the benefit of which he had surreptitiously possessed himself. It is not unjust to impute the same doctrine, or at least a tacit recognition of the husband's property in the wife, to the law of England, which pronounces adultery to be a civil injury, and provides satisfaction to the husband by an action of trespass *vi et armis*, which is the ordinary method of obtaining redress for immediate injury done to the person or property of another: but it may be asked, Is the comfort and society of the wife, in the loss of which the foundation of the action is said to consist, a personal right of the husband in any other sense than as it affects his property? It may also be questioned, how far the doctrine of the law is agreeable to the present state of English society, in which the woman is certainly not purchased by the man, is not held to be his property, but is possessed of equal and reciprocal rights: how far it corresponds with those reciprocal rights, or even with the nature of marriage, considered as a civil contract between parties equally capable of contracting, to

[c] Gibbon, c. 44.

allow to the husband, and to withhold from the wife, the right of action for damages for the civil injury; and what is the value of the common excuse for this partiality, if the gist of the action is not the danger of a spurious issue, but the loss of the wife's conversation, a loss not more injurious to the man, than is the loss of the husband's protection to the woman. It may be more generally excepted, that if under the authority of the merely civil contract the parties are free to covenant for a mutual release, and to resort to the Roman practice of divorce *bonâ gratiâ*, they are equally free to reserve a right and licence of adultery, by which the civil injury would be abated, and which is actually stipulated for in the East, is implied in all cases of polygamy and community of wives, and is supposed to have been the ground of the extraordinary power assumed by the husband of lending a wife. Such objections to the doctrine of marriage as a civil contract, and of adultery as a civil injury, it would be unjust to overlook, but it is no part of the present argument to resolve.

If marriage, as has been contended, be a divine institution, and not merely a civil contract, adultery assumes the character of a sin, and is the violation of a duty which is due to God, not less than of a duty which is due to man: and if the question be referred to the sacred writings it will be seen, as well from the punishment as from the prohibition, that adultery has always been accounted a sin of a very heinous and aggravated kind.

In the patriarchal age God took upon himself to defend the purity of the marriage bed, when it was endangered through the false fear of those who were

most concerned in its preservation. When Abram in the consciousness of Sarai's beauty advised her to assume the character of his sister, and Pharaoh, as was expected, was captivated by her beauty, the Lord plagued Pharaoh and his house with great plagues because of Sarai, Abram's wife, and deterred him from the crime which he ignorantly meditated. Pharaoh obeyed the warning, and reproving Abram restored to him his wife, not without expressing a secret abhorrence of the sin which he had tempted him to conceive, and which he would not have conceived, if he had known that Sarai was a man's wife: What is this that thou hast done unto me? Why didst thou not tell me that she was thy wife? Why saidst thou, She is my sister? so I might have taken her to me to wife. Now therefore, behold thy wife; take her, and go thy way[d].

A similar case occurred, through the same false fear and apprehension of Abraham, in which the guilt of adultery, as a sin against God, is yet more clearly demonstrated. Abraham represented his wife under the same character of his sister to Abimelech the king of Gerar: and when Abimelech had sent for Sarai, God came to Abimelech in a dream by night, and said unto him, Behold, thou art but a dead man, for the woman that thou hast taken, for she is a man's wife. But Abimelech had not come near her; and he said, Lord, wilt thou slay also a righteous nation? Said he not unto me, She is my sister? And she, even she herself, said, He is my brother; in the integrity of my heart, and the inno-

[d] Gen. xii. 11—20.

cency of my hands, have I done this. And God said unto him in a dream, Yea, I know that thou didst this in the integrity of thy heart; for I also withheld thee from sinning against me. Now therefore restore the man his wife, for he is a prophet, and he shall pray for thee, and thou shalt live: and if thou restore her not, know that thou shalt die, thou and all that are thine. Abimelech therefore restored her, expressing at the same time his just indignation at the temptation which Abraham had brought upon him: What hast thou done unto us? and what have I offended thee, that thou hast brought on me and my kingdom a great sin? thou hast done deeds unto me that ought not to be done.—And God healed Abimelech, and his wife, and his maid-servants; and they bare children: for the Lord had fast closed up all the wombs of the house of Abimelech, because of Sarah, Abraham's wife[e].

These are two recorded instances in the patriarchal age in which the Lord interposed to vindicate the purity of marriage. Adultery had not at this time been formally or expressly forbidden; at least there is no record of its prohibition, except by necessary inference from the divine institution of marriage, or by tradition from Noah, to whom, according to the Jews, there was delivered, with other precepts of natural and universal obligation, a prohibition of adultery. In the histories both of Pharaoh and of Abimelech a secret abhorrence of adultery seems to have been impressed upon their hearts, nor would either of them have entertained the thought of taking

[e] Gen. xx.

Sarai to be his wife, if he had known that she had been the wife of Abraham, and not his sister. In Egypt Abraham was apprehensive that the Egyptians would slay him, that they might obtain possession of Sarah[f]; that they would be less scrupulous of killing the husband, than of committing adultery with the wife: and, in the alarming judgment which the Lord pronounced upon Abimelech, the circumstance of Sarah's being a man's wife is introduced as a familiar, an acknowledged, and undoubted reason, for which she should not have been taken, and for which he that had taken her was but as a dead man: and although he did not proceed to the act of adultery, and the Lord in approbation of his integrity restrained him, he nevertheless pronounced the act which he meditated a sin against himself. I know that thou didst this in the integrity of thy heart, and I also withheld thee from sinning against me: therefore, because of the integrity of thine heart, and because thou mightest not sin against me, I have not suffered thee to touch her. Abimelech also affirmed the sinfulness of adultery in his expostulation with Abraham for having brought on him and his kingdom a great sin. The design of taking another man's wife was a sin against God, a great sin by the law of nature, and in the judgment of the Gentiles[g], and worthy to be avenged by a judgment of death upon Abimelech and all his house, if he persisted in his design, and did not restore the woman to her husband. In both instances the Lord visited the intention with severe and various penalties. It

[f] Patrick on Gen. xii. 12. [g] Grotius in Poli Syn. Gen. xx. 9.

is of importance also to observe, that this is the second occasion upon which a sentence of death was pronounced upon the sins of men. The murder of Abel drew down a capital judgment on the shedder of blood; the Lord himself undertook to execute the same sentence upon the meditated sins of Pharaoh and Abimelech. Murder and adultery are nearly allied in judgment and in guilt, as sins against God.

There is a striking recurrence of the same sentiments in the history of Isaac, during his abode in Gerar. He also was apprehensive that the Gerarites would slay him, that they might obtain possession of Rebekah; that they would rather murder a man, than commit adultery with a man's wife. When the true condition of Rebekah was discovered, Abimelech thus remonstrated with Isaac: What is this that thou hast done unto us? one of the people might lightly have lien with thy wife, and thou shouldest have brought upon us guiltiness, both in the heinousness of the offence, and the severity of punishment. And Abimelech charged all the people, saying, He that toucheth this man or his wife shall surely be put to death[h]. The same law protected the life of the husband, and the chastity of the wife: and it is of importance to remark, that the first sentence of capital punishment, which man pronounced, was directed against murder and adultery.

The doctrine, that adultery is a sin against God, was again, before the delivery of the Mosaic law, avouched by Joseph in the question with which he resisted the temptation of Potiphar's wife: How

[h] Gen. xxvi. 7—11. Ainsworth in loc.

shall I do this great wickedness, and sin against God[i].

Job, who also flourished before the time of Moses, declared adultery to be a crime, an excess of wickedness, worthy to be avenged with the punishments of men, and, where they failed, liable to the judgments of God: If mine heart have been deceived by a woman, or if I have laid wait at my neighbour's door, then let my wife grind to another, and let others bow down upon her, for this is an heinous crime, yea, it is an iniquity to be punished by the judges; for it is a fire that consumeth to destruction, and would root out all mine increase[k].

Thus was the sinful character of adultery acknowledged and avowed before the publication of any written law forbidding its perpetration: but as there is no sin where there is no law, and it is the essence of sin to be the transgression of a law, adultery must be considered the infringement of that natural and universal law which is written in the heart, and preserved by tradition from the first fathers of mankind. When the law of Moses was delivered, adultery was simply forbidden, by the authority of the divine legislator, as an offence of which the guilty character was so undoubted, so readily admitted by the common sense of mankind, that no reasons were alleged to justify the prohibition. In that law murder, adultery, and theft, are inseparably and immediately connected in criminal classification, and in the severe simplicity with which they are denounced. The

[i] Gen. xxxix. 9.

[k] Job xxxi. 9—12. Poli Syn. and Patrick in loc.

order of the Decalogue is, Thou shalt do no murder: Thou shalt not commit adultery: Thou shalt not steal. Murder, or the violation of God's image in man, is the first in guilt: adultery, which is the breach of his institution for the preservation of mankind, is the second: and theft, or the disturbance of his providential distribution of property, is the third gradation of offence. It is worthy of remark, that in some copies of the Septuagint, and in the arrangement of Philo the Jew, the prohibition of adultery precedes the prohibition of murder, as if the crimes were of equal or indiscriminate guilt; as if murder was not more heinous than adultery. Tertullian was acquainted with the same arrangement, which led him to expatiate in a tone of the severest indignation upon the aggravations of a sin which is second only to idolatry, and which has a bad preeminence above every other crime, without the exception even of murder.

In the great transgression of David, in which murder was combined with adultery, the Lord pronounced his equal wrath and indignation upon either sin: Wherefore hast thou despised the commandment of the Lord, to do evil in his sight? Thou hast killed Uriah the Hittite with the sword, and hast taken his wife to be thy wife, and hast slain him with the sword of the children of Ammon. Now therefore the sword shall never depart from thine house, because thou hast despised me, and hast taken the wife of Uriah the Hittite to be thy wife. Thus saith the Lord, Behold, I will raise up evil against thee out of thine own house, and I will take thy wives before thine eyes, and give them to thy

neighbour, and he shall lie with thy wives in the sight of this sun; for thou didst it secretly, but I will do this before all Israel, and before the sun. In this sentence, the charge against David of despising the Lord appears to have an immediate and especial reference to the sin of adultery; and if the sword was judicially punished by the sword, and treacherous cruelty by defeat, the adultery also was fearfully avenged, and the injury to Uriah was exactly retaliated in the treatment experienced by the concubines of David. Even in the time of his repentance and forgiveness it was resolved, that, because by this deed he had given great occasion to the enemies of the Lord to blaspheme, the child that was born unto him should surely die. All the circumstances of this history combine in justifying the expression of Origen, when he calls the offence of David, the sin unto death[l].

David himself compares the adulterer with the thief, and supposes them both, with their accomplices, to be liable to the judgments and admonitions of the Almighty: When thou sawest a thief, thou consentedst unto him, and hast been partaker with the adulterers; and thou thoughtest wickedly, that I am even such an one as thyself; but I will reprove thee, and set before thee the things that thou hast done[m].

Solomon describes the adulteress as one who forgetteth the covenant of her God; and he represents the judicial destruction of her guests, for her house

[l] 2 Sam. xii. 9—14. Orig. Select. in Psalm. [m] Psalm l. 18, 21.

inclineth unto death, and her paths unto the dead: none that go unto her return again, neither take they hold of the paths of life[n].

The divine abhorrence, and the inexcusable nature, of adultery in connexion with the prevailing apostacy are strongly depicted by the prophet Jeremiah: How shall I pardon thee for this? thy children have forsaken me, and sworn by them that are no gods: when I had fed them to the full, they then committed adultery, and assembled themselves by troops in the harlots' houses: they were as fed horses in the morning; every one neighed after his neighbour's wife: Shall I not visit for these things, saith the Lord; and shall I not be avenged on such a nation as this[o]?

The texts which have been recited afford the clearest evidence that adultery is a sin most offensive to God, and liable to his severest judgments: the criminal character of adultery, and its heinousness as a sin against God, may be further collected from the figurative use of the word to denote the highest and most aggravated offence which could enter into the contemplation of a Jew, the sin of religious apostacy. The covenant between the Lord and his people is described as a contract of marriage, and the violation of it by idolatry as an act of adultery. This figurative language is of continual recurrence in the prophecies of Jeremiah, Ezekiel, and Hosea: and some instances of the metaphor may be adduced to shew the guilt and punishment of adultery properly so called from that which is spiritual.

[n] Prov. ii. 17—19. [o] Jer. v. 7—9.

Jeremiah thus denounces the judgments of God upon the sins of the people: Therefore will I scatter them as the stubble that passeth away by the wind of the wilderness: this is thy lot, the portion of thy measures from me, saith the Lord, because thou hast forgotten me, and trusted in falsehood. Therefore will I discover thy skirts upon thy face, that thy shame may appear. I have seen thy adulteries, and thy neighings, the lewdness of thy whoredom, and thine abominations upon the hills in the fields[p]. Ezekiel reproves the accumulated idolatries of Israel, in which she had acted as a wife, that committeth adultery, which taketh strangers, instead of her husband; and, after specifying the aggravations of her offence, the prophet, in proceeding to pass judgment, pronounces in the name of the Lord, I will judge thee as women that break wedlock and shed blood are judged, and I will give unto thee blood in my fury and jealousy. . . . They shall also bring up a company against thee, and they shall stone thee with stones, and pierce thee through with swords[q]. Thus murder and adultery, the shedding of blood and the breaking of wedlock, are again combined as kindred offences; and it was of adultery that the stoning with stones was the appropriate punishment. The whole chapter, in directly condemning the sinfulness of idolatry, conveys important information on the sinfulness of adultery.

The prophet Hosea not only speaks of idolatry under the popular metaphor of adultery, but assigns the prevailing apostacy as the reason of exempting

[p] Jer. xiii. 24—27. [q] Ezek. xvi. 38, 40.

the adulteress from punishment; excusing, as it were, the proper adultery of the wife, in retaliation of the spiritual adultery of the husband: I will not punish your daughters when they commit fornication, nor your spouses when they commit adultery; for themselves are separated with whores, and they sacrifice with harlots[r]. This particular exemption of the adulteress from punishment is sufficient to shew that she was generally amenable to the judgments of God, especially in the waters of jealousy, of which the power is supposed at the time to have been judicially suspended. In this and in many other passages, idolatry and adultery are combined as cause and effect; they are identified in nature and in name; and, in the judgment of a true Israelite, adultery could not be more severely condemned or more powerfully designated as a sin against God.

There is a passage in the apocryphal Book of Wisdom, which it is necessary to recite in testimony of the opinion which the ancient Jews held of the sinfulness of adultery; of the class of crime in which they placed it; and of the source and origin from which in its predominance it was supposed to proceed. The writer, in speaking of idolaters, affirms, that they kept neither lives nor marriages any longer undefiled, but either one slew another traitorously or grieved him by adultery; so that there reigned in all men without exception, blood, manslaughter, theft, dissimulation, corruption, unfaithfulness, tumults,

[r] Hos. iv. 14.

perjury, disquieting of good men, forgetfulness of good turns, defiling of souls, changing of kind, disorder in marriages, adultery, and shameless uncleanness[s].

The author of the Book of Ecclesiasticus also unequivocally declares his opinion, that God is the judge of the adulterer and the adulteress, and that they trespass against the law of the Most High: A man that breaketh wedlock, saying thus in his heart, Who seeth me? I am compassed about with darkness; the walls cover me, and nobody seeth me: what need I to fear? The Most High will not remember my sins:—such a man feareth only the eyes of men, and knoweth not that the eyes of the Lord are ten thousand times brighter than the sun, beholding all the ways of men, and considering the most secret parts. . . . This man shall be punished in the streets of the city; and where he suspecteth not, he shall be taken. Thus shall it go also with the wife that leaveth her husband, and bringeth in an heir by another: for first, she hath disobeyed the law of the Most High; and secondly, she hath trespassed against her own husband; and thirdly, she hath played the whore in adultery, and brought in children by another man. She shall be brought out into the congregation, and inquisition shall be made of her children: her children shall not take root, and her branches shall bring forth no fruit: she shall leave her memory to be cursed, and her reproach shall not be blotted out: and they that remain shall

[s] Wisdom xiv. 24—26.

know that there is nothing better than the fear of the Lord, and that there is nothing sweeter than to take heed to the commandments of the Lord[t].

The prophet Malachi assigns a different reason for the offence which the Lord took at the adulteries which prevailed in his time, and which principally consisted in the divorce of the lawful wife, through a preference of foreign and idolatrous women: Because the Lord hath been witness between thee and the wife of thy youth, against whom thou hast dealt treacherously; yet she is thy companion and the wife of thy youth[u]. Their adultery comprehended perjury, or the violation of the solemn engagement of their marriage, in which they had called God to witness their vows, in whose name as well as by whose institution the wife of each of them had been made his companion for ever, even the wife of his covenant, and against whom he could not deal treacherously without sin and offence to the Deity.

It is a truth therefore which cannot be controverted, that, in the judgment of the Jews, and in the doctrine of their inspired and uninspired instructors, adultery was a sin against God: but it will be pretended that the judgment of Christians is not bound to defer to Jewish opinions, and that men are now placed under a law more accommodated to the real condition and circumstances of man upon the earth, and at liberty to take a larger and more comprehensive view of the divine judgments and proceedings with mankind than was agreeable to the narrow prejudices of the Jews, and to their conceptions of the

[t] Ecclus. xxiii. 18—27. [u] Mal. ii. 14.

immediate interpositions of the Deity. It ought not however to be forgotten, that the Lord pronounced adultery to be a sin against himself, before the origination of the Jewish polity; and it might be confidently maintained, if it were necessary to argue the question, that the true doctrine of marriage and adultery is primarily and originally derived from the law given to Adam, recorded by Moses, amplified by the precepts successively delivered by the prophets, and finally recovered from the glosses and comments of pharisaic superstition, and restored to its native purity by the Saviour of mankind. But it is an easier and more certain method of forming a Christian estimate of the nature and guilt of adultery, to refer to the words of Christ and his apostles, and to shew in what class of crimes they comprehended it, from what sources they derived it, and to what judgments of the Deity they pronounced it to be liable.

When our Saviour referred to the institution of marriage, he evidently pronounced it to be a divine institution: the violation of marriage is therefore the violation of a divine institution, and by consequence a sin against God. The general rule which our Lord delivered concerning divorce, is not unsuitable to adultery: What God hath joined together, let no man put asunder by any division of the unity which he hath consolidated[x].

In delivering an authoritative comment upon the original prohibition of adultery, our Lord hath declared the heinousness of the sin, by the rigorous

[x] Matt. xix. 6. Mark x. 9.

caution which he hath prescribed in avoiding it, and by the fatal consequences which he hath attached even to mental transgression: Ye have heard that it was said by them of old time, Thou shalt not commit adultery: but I say unto you, Whosoever looketh upon a woman (a married woman γυναικα[y],) to lust after her, hath committed adultery already with her in his heart: and if thy right eye, by thus looking upon a woman, shall cause thee to offend, pluck it out and cast it from thee: for it is profitable for thee that one of thy members should perish, and not that thy whole body should be cast into hell[z]. The sentence is primarily appropriated, and naturally applied, to the sin of adultery, although in other texts it may be of more general application.

The order in which our Lord, in enumerating the various issues of the corrupted heart, arranges the violations of the second table, is the same as that which obtains in the Decalogue: Out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, blasphemies[a].

These declarations of our Lord sufficiently prove his concurrence in the sentiments of the Jews, concerning the heinous sinfulness of adultery; and notwithstanding the mildness and benevolence of his character and disposition, not a word or an act can be alleged in which he palliated or extenuated its aggravated guilt. Although he approved the faith

[y] γυναικα αλλοτριαν. Theoph. ad Autol. l. iii. s. 13. αλλοτριᾳ γυναικι. Cl. Alex. Strom. l. vii. s. 13. Alienam mulierem. Orig. Hom. in Gen. i. s. 17. Cf. Basil. λογες προς τους νεους.

[z] Matt. v. 28, 29. [a] Matt. xv. 19.

of harlots and publicans, and foretold their admission into the kingdom of heaven[b], his judgment was founded on the consideration of their repentance and conversion, and it is by no means certain that he used the word in its received and ordinary sense: when he condescended to converse with the woman of Samaria, he declared her condition without reserve, and awakened her conscience by the freedom and severity of his reproofs[c]: nor was there more lenity in the manner in which he treated the woman taken in adultery[d]. He made no objection to the rigour of the ancient law, which punished the offence with death; he offered no apology for the woman's guilt; if he pronounced no condemnation he delivered no sentence of acquittal. He required, indeed, as in the law of the bitter waters, that the accusers should be pure and free from sin; and referring them to their own conscience, he proved their incompetence to appeal to the conditions of that law: he was aware that they were tempting him, and he had the address to defeat their attempt. When he was left alone with the woman, when her convicted accusers had abandoned the charge, and he was on the point of dismissing her, he said, Neither do I condemn thee. It was not a cause in which he was sent to judge; but he nevertheless added, Go, and sin no more: evidently implying that she had been living in sin.

Under the phrase of an adulterous generation, our

[b] Matt. xxi. 31, 32. See Appendix, No. I. [c] John iv. 7—26. [d] John viii. 1—11.

Saviour means to denote a very high degree of guilt, whether of positive adultery or religious apostacy[e].

Saint Paul speaks of whoremongers and adulterers, whom God will judge[f], thus reserving the judgment to the Almighty; he includes adultery among the most heinous sins, and makes it amenable to the heaviest judgments: Neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners, shall inherit the kingdom of God[g]. He places it also at the very head of the works of the flesh: Adultery, fornication, uncleanness, lasciviousness, idolatry, witchcraft, hatred, variance, emulations, wrath, strife, seditions, heresies, envyings, murders, drunkenness, revellings, and such like, of the which I tell you before, as I have also told you in times past, that they who do such things shall not inherit the kingdom of God[h]. In another text he speaks not only of God's reserving the judgment of the adulterer to himself, but describes adultery as an act of contempt to God, and of fraud to man, unsuitable to the holiness of the Christian state: Ye know what commandments we gave you by the Lord Jesus; for this is the will of God, even your sanctification .... that no man go beyond, transgress, or defraud his brother in the matter, for the Lord is the avenger of all such, as we have also forewarned you and testified. For God hath not called us to uncleanness, but to holiness. He therefore that despiseth, de-

[e] Matt. xii. 39. xvi. 4. Mark viii. 38. μη εγνωκοτες νομον, ὡς ὁ νομὸς βουλεται. Cl. Alex. Strom. l. iii. s. 12.

[f] Heb. xiii. 4. [g] 1 Cor. vi. 9, 13. [h] Gal. v. 19—21.

spiseth not man but God, who hath also given unto us his Holy Spirit[i].

Saint James asks with indignation, Ye adulterers and adulteresses, know ye not that the friendship of the world is enmity with God? Whosoever therefore will be the friend of the world is the enemy of God[k].

Saint Peter speaks of profane seducers, as having among their other sinful characters, eyes full of adultery, and that cannot cease from sin[l].

Saint John, in the Apocalypse, copies the metaphor of the ancient prophets, and represents apostacy and apostates from the true religion, under the name of adultery and adulterers.

It will hardly be disputed, that the sinfulness of adultery, and its liability to a sentence of eternal condemnation, are scriptural doctrines; and that, as scriptural doctrines, they rest upon authority which commands the assent of the theologian, and obliges him to maintain them without any compromise or abatement of their rigour or simplicity. The first fathers of the Christian Church strictly followed the example that was before them, and when they made mention of adultery, they classed it with the most offensive sins; they attached to it the most opprobrious epithets[m]; and they exhibited, without any compromise, its most fatal consequences. Tertullian especially conceived all falsehood to be synonymous with adultery, and pronounced every idolater to be an adulterer in respect of the truth[n], and all

[i] 1 Thess. iv. 2, 3, 6—8. Whitby in loc. [k] James iv. 4.
[l] 2 Peter ii. 14. [m] Clem. Rom. ad Cor. Ep. i. c. 30. Cf. Ep. ii. c. 4, 6. [n] De Idol. s. 1.

who corrupted the purity of the truth by accommodating it to philosophical opinions, or by the introduction of fabulous additions, to be guilty of adulterating the truth[o]. He expatiates with extraordinary force and eloquence on the sinful nature of adultery, alleging the law of God to shew how its guilt may be estimated according to its criminal operation. If after the interdicted worship of the heathen divinities and the fabrication of idols; after the approved veneration of the sabbath, and the commanded piety to parents, which is second only to that which is due unto God, the Almighty has laid down no other fundamental rule for confirming and recommending such precepts, besides the law, Thou shalt not commit adultery, (for after spiritual chastity and purity immediately follows personal purity, which he has fortified by instantly proscribing its enemy adultery,) it will be presently understood what is that fault of which God has arranged the prohibition after idolatry. There is nothing second to distinguish it from the first. There is nothing so near to the first as that which is second. That which originates in the first is itself in a certain form the first. Therefore adultery is akin to idolatry. For idolatry, with which the people are often reproached under the name of adultery and fornication, shall be combined with it in its portion, as it is in the series and succession of the law: it shall be united with it in its condemnation, as it is in the present arrangement and order of the commandments.

[o] Apologet. s. 47.

The law speaks more fully; premising, Thou shalt not commit adultery; it subjoins, Thou shalt not kill. It aggravates adultery by placing it before murder. In the very front of the most holy law, in the first title of the heavenly proclamation, it is distinguished by being proscribed before the principal sins, the character of each of which may be ascertained by its position, its state from its order, its merit from its company. It is the dignity of evil to be placed at the head or in the midst of the worst offences. I observe, as it were, the procession and throne of adultery, idolatry leading the way, and murder following as a companion and attendant, and adultery herself sitting down, as without doubt she is worthy, between the most elevated summits of crime, in the middle of which she has seized possession of the vacant throne, with the just authority of guilt. Who, when she is surrounded by such attendants, when her body is thus propped up and supported, who will tear her from the train of her adherents, from the connexion of neighbouring crimes, from the embrace of kindred sins; or detach her from them, and place her separately and by herself, to bear the fruit of repentance? Will not idolatry on one side, and murder on the other, hold her back and detain her? And if they have a voice, will they not exclaim in her defence, This it is that as a wedge binds us together and consolidates us. We measure ourselves from adultery: we are combined by her that is placed between us, and alone divides us: we wait with adulation upon her that is elevated between us: the divine Scripture hath bound us into one

body: the letter of Scripture is our bond of union: nor has she power without us. I, Idolatry, administer the most common occasion of adultery: my groves, and my hills, and my fountains, and my temples in the city, know of what modesty I procure the destruction. I, Murder, also labour in the work of adultery; I make no allusion to the Tragedies; today the makers of poison know, the sorcerers know, how many seductions I avenge; how many jealousies and rivalries I cut off; how many guardians, how many accusers, how many witnesses to the deed I take away: the midwives also know how many conceptions of adultery are slain. Even among Christians there is no adultery without us. Idolatries are there, wherever is the work of the spirit of impurity: murder is also there, wherever man is polluted and slain. Wherefore the aid of penitence will not be appropriate to them, or it will be appropriate to us also. We either detain her or we follow her. These are words which facts themselves deliver. If facts themselves cannot speak, yet there stands the idolater, there the murderer: between them stands the adulterer also. In the office of penitence they equally sit in sackcloth, and become squalid in ashes: they groan with the same breath; they supplicate with the same prayers; they prostrate themselves upon the same knees; they invoke the same mother. What art thou doing, most mild and gentle discipline? Thou oughtest to be such to all; for Blessed are the peacemakers: or if not such to all, thou shouldst be on our side. Thou dost indeed condemn the idolater and the homicide; dost thou except the adulterer who is between them?

him, who follows the idolater, who guides the adulterer, who is the colleague of both[p]?

In the Apostolical Constitutions the guilt of adultery is denounced, because it divides the unity which God hath consolidated in marriage[q]: and the author of the Clementina is, with other primitive writers, earnest in recommending early marriages, that the fervour of passion may not be kindled into a flame, or, by occasion of fornication or adultery, bring a pestilence upon the Church; for beyond every other sin, the impiety of adultery is abhorred by God, for it not only slays the offender, but all who are acquainted and converse with him; for it is like a pestilence, and has a natural power of spreading its own mania, and involving all in the guilt of the adultery, which God hath pronounced to be very heinous, and is so great, that the second penalty is annexed to it, the first being due to those that live in error. Fornication is adjudged by God to be very aggravated; there are many sorts of it, but the first is adultery, a great evil; and it is so contrary to the Christian discipline, that they who are guilty of it separate themselves, and are separated, from the communion of the faithful; and that, like apostates to heathenism, incited by the devil, and conceiving in concert things which are not lawful, they perish under a charge of adultery, and are excluded from the kingdom of heaven[r].

Origen quaintly calls adultery the money of the devil, bearing his image and superscription, and pro-

[p] De Pudicit. s. 5. [q] Const. Apostol. l. vii. c. 2.
[r] Epist. Clem. ad Jac. s. 7, 8. Clement. Hom. iii. c. 68, 69, 8.

ceeding from his mint. Thou hast committed adultery: thou hast received the coin of the devil. With this coin he purchases whom he does purchase, and secures to himself the service of all who receive ever so small a sum of this revenue[s]. He justly remarks, that no man can commit adultery alone, without having an adulteress, the associate and partner of his offence: and although more are not required, it is necessary that some man or some woman should minister in the participation of the offence, and all who are concerned in it derive their injurious nativity from their father the devil[t]. In another place he supposes, that prayer would in vain be offered for the forgiveness of adultery, and disputes the pretensions of such as took upon themselves to pardon idolatry, and to remit the guilt of adultery and fornication, as if even the sin unto death might be absolved by their prayer in favour of the men who had dared to do such wickedness[u].

But it is in vain to multiply authorities, or to collect proof of the rigorous and uncompromising severity with which adultery was denounced in the primitive Church. The Christian and the divine need not to be convinced of its sinful character; and it is necessary to take a more popular view of its accumulated guilt, for the satisfaction of such as are more accustomed to hear the palliations and extenuations of vice, than the strictness of the sacred law, and are wont to contend, that the merits of

[s] In Exod. Hom. vi. s. 9.

[t] Ibid. Hom. viii. s. 6.

[u] De Orat. s. 28. So he says that the adulterer λιαν εργον πραττει κακον. De Rect. in Deum Fide, sect. 4.

adultery cannot be appreciated without a large acquaintance with the world; that its several bearings cannot be traced in the closet of the theologian; or be defined by religious authorities; by the rules of Christian duty; or the conditions of the judgment to come.

It is not the Scripture, or Christian antiquity, alone which has appropriated adultery to the figurative description of what is false in religious doctrine and practice: the metaphor has been readily adopted into the language of men, and the name of adulterated has been attached to every thing which is base and counterfeit, and perverted by art from its proper and genuine use and condition. The metaphor stamps the infamy of the crime; it proves it to be the consummation of fraud.

Adultery cannot be perpetrated without perjury, without a violation of that solemn engagement in which a married person has bound himself to another in the presence of witnesses, and with an earnest adjuration of the Deity in attestation of his vows. It is upon this account that the prophet Malachi calls the Lord a witness between a man and the wife of his youth, and infers the guilt of dealing treacherously with her[x]. If marriage be thus considered in the light of a religious vow, adultery cannot be committed without perjury, and the perjury is not the more venial because the oath is administered by a minister, and not by a magistrate. "No person can doubt, that adultery is a crime of a most flagrant nature, involving too that of perjury,

[x] Mal. ii. 14, 15.

in addition to its otherwise heinous guilt; and so, in every point of view, a gross violation of the laws both of God and man[y]." If both parties are married, the perjury is committed by both: if the seduced person is married, and the seducer is unmarried, there is on the one side actual perjury, and on the other subornation of perjury. These are not venial offences even in the judgment and estimation of men; they are sins which God hath declared that he will not hold guiltless; and while the spirit of honour consists in an exact fulfilment of the word of promise, it is folly to call the adulterer an honourable man: it is a solecism in morals to suppose that the man who is guilty of perjury can be innocent of crime.

The condition of a whore is a condition of shame, and infamy, and vice, which no man will attempt to palliate or excuse: the merest voluptuary seeks retirement in his debaucheries, and ventures not to speak of them but in the most profligate society. Is the condition of the adulterer and the adulteress a condition less pregnant with ignominy, or more capable of vindication and defence? What is the end and object of adultery, but the gratification of the basest, the most depraved, and merely animal passion? the indulgence of the most selfish desire with the least consideration of what is reasonable, honourable, generous, and humane? the accomplishment of the most nefarious purpose, by means the most degraded and degrading, by fraud, treachery, and disguise? "What," asked Lord Eldon in a tone

[y] Fergusson's Reports, p. 350.

of virtuous indignation, "what was the plain English of all the cant which he heard respecting the honourable intentions of the adulterer in proposing to marry the woman whom he had seduced? Could any form of words, any ingenuity of mind, any power of eloquence, conjure up for a single moment what would serve to throw a ray of true honour on the seducer of the married woman? Such a man ought to be hunted from society, as its bitterest enemy; as the inveterate foe of morality; the malignant fiend, whose purpose it was to undermine private happiness wherever he found it, as the surest means of destroying all public virtue[z]."

In what character does the adulterer address the adulteress? Each would loathe and abhor the other, if the guilty passion were unequivocally avowed, and the act of adultery were contemplated without reserve. It is by the practice of the most consummate hypocrisy that the virtue of the man is tempted, or the constancy of the woman is overcome. The overture commences with professions of respect, which the end belies; and is carried on by insinuations of love, which cannot be more than brutal appetite; by promises of immunity and protection, which it is impossible to realize; and by the wanton suggestion and unjust excitement of suspicions, jealousies, and aversions from the proper object of affection. "He," said Lord Mulgrave, "would be a clumsy man of intrigue indeed, who should begin his attempt to obtain the favours of a woman by offering her marriage after she should have consented

[z] Woodfall's Parl. Rep. vol. xx. p. 317.

to violate the solemn vow she stood pledged to in the sight of God. No; his weapons would be flattery of her understanding, depreciation of that of her husband, insinuation of his own superior mind and talents, and exaggerated pictures of the fanciful prospect of avoiding detection, accompanied with the most earnest protestations of eternal constancy on his part, and the most alluring representations of the happiness she had in her power to maintain and continue to enjoy in his company and attentions[a]." When by these means the mind and moral principle are debauched, and compliance and consent are extorted by a complication of lies and deception, for which there is no adequate name: what is the triumph which is achieved, but the possession of the most abandoned of the sex, of a woman whom a man would blush to call his wife, his daughter, his mother, his sister, or even his acquaintance? If, in the moment of their perpetrated crime, the adulterer and the adulteress could weigh the character of each other with a clear and unbiassed judgment, it is hard to conceive the terror with which the woman would behold the author of her ruin, or the scorn and aversion which the man would feel to the base polluted victim of debauchery; in what an instant the mutual delusion would vanish, and love be turned into loathing, and the professions of ardent admiration into a feeling of the deepest abhorrence and disgust.

The fraud upon the offending woman has no parallel but the fraud upon the injured man. The

[a] Woodfall's Parl. Rep. vol. xx. p. 314.

adulterer frequently enters the house of the husband in the guise and character of a friend. While the duties of that sacred relation require him to communicate any suspicions which he may have reason to entertain of the inconstancy of the wife, he is deceiving his friend, and abusing his confidence, at the time that he is debauching his wife, and destroying his best and dearest interests. If his friend's suspicions are excited, and he is forbidden access to the house, there is no artifice to which he will not resort, there is no occasion of which he will not avail himself, for the accomplishment of his dissolute design.

Adultery includes the crime of seduction; and "the seducer practises the same stratagems to draw a woman's person into his power, that a *swindler* does to get possession of your goods or money; yet the law of honour, which abhors deceit, applauds the address of a successful intrigue. So much is this capricious rule guided by names, and with such facility does it accommodate itself to the pleasures and conveniency of higher life.

"Seduction is seldom accomplished without fraud, and the fraud is by so much more criminal than other frauds, as the injury effected by it is greater, continues longer, and less admits of reparation[b]."

If injuries are to be estimated by their mischievous effects, there is no injury more aggravated than adultery. It is the irretrievable ruin of the woman; it contaminates her family with a taint which the jealousy of a brother's honour will make the last sacrifice to remove; which throws suspicion on a sister's

[b] Paley's Moral Phil. b. iii. c. 3.

purity; which brings a parent's hairs with sorrow to the grave. It inflicts upon domestic peace a wound which no balm can heal, which no oil can assuage: it destroys the name and relation of husband and of wife: it too often weakens the obligations of parental love. When the adulterer is the father, and the adulteress the mother, of a family, what is not the injury which that family sustains, from the act, from the example, from the loss of natural protection and advice? "The children are generally involved in their parents' shame, and always made unhappy by their quarrel." The injury which is done to the wife is more than reflected upon the children; and it was the just remonstrance of an injured husband, that the adulterer had offended against his wife and against his children[c]. When the adulteress is separated from her husband, her children are deprived of a mother's care, and abandoned by the parent who should have protected and instructed their infant years; they are impressed with a secret abhorrence and shame of a mother whom it was their first duty to love and to honour. Even their father's affections are abated, from a recollection of their mother's wrong, and often transferred to another wife, and another family. There is the permanent exhibition of an example, which may be made the pretence for crime; there is an imputation upon the hereditary character, which may produce a recklessness of offence, which the most unsullied purity shall not be able to obliterate, and under which the hand of the

[c] Lysiæ ὑπερ του Ερατοσθενους φονου απολογια. ed. Taylor, p. 6.

daughter shall be spurned, and the sin of the mother be visited on the child.

The injury which adultery "inflicts on the husband and the children are beautifully but painfully stated by an excellent American writer to be such as numbers cannot calculate, and tongue cannot describe. The husband is forced to behold his wife, once beloved beyond expression, not less affectionate than beloved, and hitherto untarnished even with suspicion, now corrupted by fraud, circumvention, and villainy; seduced from truth, virtue, and hope; and voluntarily consigned to irretrievable ruin. His prospects of enjoyment, and even of comfort, in the present world are overcast with the blackness of darkness. Life to him is changed into lingering death; his house is turned into an empty, dreary cavern. Himself is widowed, his children are orphans, robbed of all their peculiar blessings, the blessing of maternal care and tenderness, the rich blessing of maternal instruction and government, the delightful and persuasive blessing of maternal example: and this, not by the righteous providence of God, but by the murderous villainy of man. Clouded with woe, and hung round with despair, his soul becomes a charnel house, where life, and peace, and comfort, have expired; a tomb, dark and hollow, covering the remains of departed enjoyment, and opening no more to the entrance of the living[d]."

No man, who has the heart to contemplate the perfection of domestic happiness, can be at a loss

[d] Tebbs's Essay on the Scripture Doctrines of Adultery and Divorce, p. 222.

"to determine what would be *the greatest injury* which human malice could devise against it, if it were in the power of malice to execute every atrocity which it might conceive. It would be that very injury which the adulterer perpetrates, the crime of *him*, who can see all this happiness, and can say in his heart, *This happiness shall last no longer.* A time may indeed come, when, if his artifices be successful, this happiness will exist no more: when she who was once as innocent as she was happy, shall have been consigned to that remorse which is to hurry her, too slowly for her own wishes, to the grave; and when the home which she has deserted shall be a place of wretchedness and desolation, where there is one miserable being who knows his misery, and others who still smile while they enquire anxiously, with a sort of fearful wonder, for the presence of her whose caresses they no longer enjoy, and are as yet ignorant that a time is to arrive, when they are to blush at the very name of her, to whose knee and embrace of fondness they are longing to return.

. . . "And of all this mass of wretchedness which the adulterer produces, and of all the iniquity which can calmly meditate and plan such wretchedness, what is the palliation which he assigns? It is the violence of his love alone which he pleads. He is not aware what aggravation there is of his guilt, in that which he regards, or professes to regard, as the apology of it. If by love he means mere sexual appetite, his excuse is of the same kind as that of the common robber, who should think that he has given a moral justification of his rapacity, by describing

the debaucheries which it enables him to pursue, and the difficulty which, without his thefts, he should feel in visiting as frequently the tavern and the brothel. And if by the love which is asserted be meant an affection more worthy of that name, what are we to think of the sincerity of his love, who, to gratify his own lust, is eager to plunge into guilt and wretchedness the very being whom he professes to regard with an interest which should have led him, if sincere, to expose himself to every thing but guilt, to save her from misery like that which he is intentionally preparing for her? To speak of affection, therefore, or of feelings to which he dares to give the name of affection, is on his part to double his crime. It is to confess, that while he is not merely regardless of the happiness of the husband whom he robs, but equally regardless of the happiness of her of whom he robs him; he is as completely and brutally selfish in his *love* as he would be in his *indifference* or in his *hatred:* and that the peace and virtue, and honour, of the being whom he professes to regard as the dearest to him in existence, are therefore as nothing, when he must either sacrifice *them*, or make a sacrifice, which is far more painful to him, of one of his own desires[e]."

Adultery is strangely represented by the law of England as an act of trespass *vi et armis;* and if the extent of injury bear any proportion to the force and violence which is offered to the will and affections of the person who is injured, it is certain that adultery

[e] Brown's Lectures on the Philosophy of the Human Mind. Lect. lxxxiv.

is the consummation of wrong. There is no injury which a man would be more unwilling to sustain, or more anxious to avert: it is a wrong which a man dares not even to contemplate, to which he cannot bring himself to assent, in which the laws of society will not permit him to connive with impunity: or if there be any man in a civilized country, so debased in heart and mind, as to prostitute the honour of his wife, and to make himself the partner of her shame, he is deprived of all title to legal redress, as a man who is not susceptible of injury; the finger of scorn is pointed at him, and he bears a name of reproach which none can tolerate but the effeminate Italian. The wrong of adultery is such as almost justifies the extremities of resentment: and although fraud, and robbery, and libel, may be overlooked and pardoned, the crime of the adulterer may not be compromised. It was one of the proverbs of the wise king of Israel, Whoso committeth adultery with a woman lacketh understanding: he that doeth it destroyeth his own soul. A wound and dishonour shall he get, and his reproach shall not be wiped away: for jealousy is the rage of a man; therefore will he not spare in the day of vengeance. He will not regard any ransom, neither will he rest content, though thou givest many gifts[f]. It has been already shewn, that in the arrangement of the sacred Scriptures, and in the argument of the primitive writers, murder and adultery are kindred crimes: and instances have been alleged, in which murder has been meditated in preference to adultery. It is not intended to take any advantage

[f] Prov. vi. 32—35.

of this argument, but in proof of the general sense of the guilt of adultery ; which is further proved, as the divine arrangement of the crimes is justified, by the common immunity afforded to men who have taken upon themselves to avenge their own wrongs, and who, if they have not been protected by the express sanction of the law, have been acquitted upon their trial before the public tribunals. The liability of the adulterer to private revenge, was the rule not only of Athens and of Rome, and of other nations of the heathen world: it was sanctioned by the express law of the emperor Justinian ; and even under the law of England it is all but authorized, under the name of justifiable homicide. Can there be stronger proof of the guilt, than is found in the penal retribution ?

If the appeal were made to the golden rule of Christianity, and the judgments of men could be collected from their own sense of injury, there is not a father, a brother, a son, or a husband, who would not instantly agree in deprecating, above all other wrongs, the adultery of her whom they severally hold most dear, the adultery of their sisters, their daughters, their mothers, and their wives. The judgment of mankind in secret, and their voice in public, would be instantly raised in denouncing the offence of the adulterer.

It is the dangerous hypothesis of some who suffer themselves to make distinctions in vice, that adultery is more aggravated in women than in men ; and it is certain that chastity is the chief honour in women, that the loss of it is synonymous with complete depravity, and that the purity of pedigree and descent

depends upon the constancy and virtue of the wife. But as a sin and transgression of the divine law, adultery is not palliated, it cannot be aggravated, by the distinctions of sex: and in reference to the divine judgments, it is equally criminal and equally penal in the man and in the woman. The man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall be surely put to death[g]. It is remarkable also that our Lord, in commenting upon the original prohibition of adultery, contemplates chiefly the offence of the man: Whosoever looketh upon a married woman, to lust after her, hath committed adultery with her already in his heart[h]. He contemplates the same result in a man's marrying a woman that is divorced[i].

It was worthy of the passing wisdom of the civil law, that by too strict an adherence to the etymology of the word, derived from the criminal access to another's bed, (*ad alterius* torum,) the offence of adultery was restricted to the woman, and no notice was taken of the intercourse of a married man with an unmarried woman. Hence arose the distinction between double and single adultery; the former committed when both the parties were married, the latter when the one was single. This restriction was evidently founded on the prevailing notion of a man's property in his wife, as it was opposed to the scriptural notion of marriage and adultery, and to the equal obligation to chastity in the man and

[g] Levit. xx. 10. [h] Matt. v. 28. [i] Matt. v. 32. xix. 9. Luke xvi. 18.

the woman, and called forth the strong protest of the Christian fathers, on the difference between the laws of Cæsar and of Christ, of Papinianus and of Paul[k].

The notion of adultery is so far restricted to marriage, that there is no adultery where there is no marriage. But if a single man debauches a married woman, it will be generally admitted that his celibacy does not excuse him from the charge of adultery; and parity of reason requires, that if a married man has criminal intercourse with any other woman than his wife, he is guilty of adultery, whether the woman is married or unmarried. The woman is guilty of adultery in respect of the man's wife: and there is in adultery such a reciprocity or common participation of crime, that it is impossible that the one should be guilty and the other innocent: the charge must attach to both or to neither. The offence is quite independent of the Latin etymology: its entire essence is the violation of conjugal faith.

It was the argument of the amiable and accomplished Lactantius, that the man who has a wife should not have in addition either a slave or a free woman. For it is not, as under the rule of the public law, the woman, who has another beside her husband, that is alone guilty, while the man who has other women besides his wife, is acquitted of the charge of adultery: the law of God has combined the two in matrimony, as into one body; with such equal rights, that the man is held to be an adulterer

[k] Hieron. Ep. ad Oceanum. apud Gerhard.

who shall divide the union of that body. . . . Fidelity is therefore to be observed by both parties; or rather, the wife should be instructed in chastity by the example of the husband's virtue. It is unjust to demand that debt of a wife which the husband neglects to pay. Such iniquity has been the cause of adultery, when the wife has been impatient of rendering fidelity to a husband who exhibits no return of affection. Nor is there any adulteress so abandoned and unprincipled, as not to plead, in extenuation of her fault, that she does not commit the original injury, but only retaliates. This is the excellent observation of Quintilian, when he says, The man who does not abstain from another's marriage, ceases to be the guardian of his own: for between these things there subsists a natural and mutual connexion. When the husband is occupied in the seduction of another man's wife, he can have no leisure for the cultivation of domestic sanctity: and the wife who falls into such a marriage, is provoked by the example which she thinks herself at liberty to imitate or avenge[l].

Gregory of Nazianzum also objects to the received law, that men were the legislators, and that therefore the law was not in favour of women[m].

Jerome argues on the same principle with Lactantius, that whatever is prescribed to men refers by consequence to women. Among Christians, whatever is unlawful to women is equally unlawful to men; and the same service is held upon equal conditions[n].

[l] Div. Inst. l. vi. c. 23. [m] Orat. ad Virg. apud Gerhard.
[n] Ep. ad Ocean. Ibid.

Ambrose also maintains, that no man should derive a false security from the laws of men. All whoredom is adultery, nor is that lawful in the man, which is unlawful in the woman. The same chastity is owing from the husband, as is owing from the wife. Whatever is committed with a woman, who is not a lawful wife, is liable to the charge of adultery[o].

Augustin complains, that men are offended at the suggestion, that adulterers should suffer the same punishment as adulteresses, when they ought to be punished the more severely, as they are the more concerned to excel in virtue, and to rule their wives by their example[p]. He also admonishes such as are about to marry, to preserve themselves in purity for their wives. Such as you wish to find them, let them find you. Who that would marry, does not require chastity in his wife, and the purity of a virgin bride? Do you desire purity? Be pure. Chastity? Be chaste. The woman has no power which you do not possess[q].

In answer to the reciprocal claims of conjugal fidelity, which are stated with more force than might be expected from the writers of the fourth century, and in favour of the alleged aggravation of adultery in the woman, it is common to object the danger of a surreptitious issue. But the essence of adultery consists in the actual violation of conjugal faith, not in the adventitious result, on the occurrence of which no man would rest the guilt of adultery. Thus to

[o] De Abrah. l. i. Ibid. [p] De Adulterin. Conjug. l. ii. Ibid.
[q] Serm. xlvi. De Verb. Dom. Ibid.

leave the offence in a precarious dependence on the proof, would be to revive the exploded doctrine of a false philosophy[r], that there is no evil in the adultery which is unknown or unheeded: nor in any candid or ingenuous judgment is the tree which bears the bastard fruit more in fault than the hand which inserts the vicious graft, without which the tree would be fruitless, or would bear its proper fruit. In the very highest case, which relates to the danger of a spurious issue, and in the memorable interpretation of the singular law which pronounces adultery committed with the Queen of England, or the Princess of Wales, to be high treason, the woman is regarded, not as the principal, but the accessary; so that if the adulterer be a foreigner, owing no allegiance, the treason is incomplete, and the capital punishment is avoided. It is an obvious conclusion from this interpretation, that if the accessary is not more guilty than the principal, the adulterer is not more innocent than the adulteress. In the more ordinary practice of the English law, it is not the danger of a supposititious issue, but the loss of a wife's society, which is the ground of the action for criminal conversation; and if guilt is to be estimated by injury, it might be difficult to shew in what respect the loss of a husband's protection is less injurious than the loss of a wife's society. It is certainly no common injury which the wife sustains in the preference shewn to a prostituted rival; in

[r] Compare Origen c. Celsum, l. vii. s. 63. where he specifies the several motives of the Greek philosophers in refraining from adultery.

the alienation of a husband's favour; in the slight of her own fond affection; the *spretæ injuria formæ;* the impoverished provision for her children; the destruction of all domestic comfort; and the reduction to a state the most trying and delicate; in which her conduct will be weighed with the keenest jealousy and suspicion; in which her character can only be sustained by the severest and most inflexible rectitude, and the most religious circumspection; in which she is exposed to the most powerful temptation from the arts of seduction, and the passion of revenge; in which the virtues of the wife must rise in proportion to the vices of the husband; and from which the partiality of the law refuses to release the wife, while it is too ready to redress the injury of the husband, and permits her "either to be cast off at his pleasure, or compelled to suffer the last wrongs of a wife, of remaining the helpless and neglected witness of his infidelity.

ultimum est nuptæ malum
Palam mariti possidens pellex domum. Seneca[s]."

The opinion therefore which would aggravate the guilt of the adulteress fails to palliate the guilt of the adulterer. However in the partial judgments of men the adulterer may be acquitted, and the adulteress condemned; however the one may be received without a blush into society, while the other is shunned, and forced, at least for a time, into a wholesome seclusion, there is a law which comprehends both the adulterer and the adulteress in equal guilt: or however in practical experience the

[s] Qu. Rev. xlix. p. 252.

adulterer, as the seducer, or as the man more capable of resisting the seduction, is the more criminal, it is hazardous to make distinction in crimes of which the guilt admits of no apology, and of which the final doom, if it be not prevented, is incapable of aggravation.

In proof of the aggravated sinfulness and criminal character of adultery it has been shewn, that, before the delivery of any written law, God took upon himself the punishment of this offence, and in various cases pronounced or inflicted an immediate and extraordinary judgment on the offender. It will be proper now to renew the consideration of the several laws which have proceeded upon this precedent to regulate the punishment of the offence in different ages, and in different countries, more or less improved by civilization and religious knowledge, and to collect additional evidence of the nature of the crime from the nature of the punishment.

When the law was delivered to Moses, adultery was made a capital offence in both parties, and the divine judgment was expressly committed to the mediation and administration of men: The man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death[t]. It was the remark of Origen, that the prohibition and the penalty were delivered at different periods; the one originating in a father's love, and designed to attract a pious and affectionate compliance; the other denounced upon such as de-

[t] Lev. xx. 10. Patrick in loc.

spised that love, and drew down upon themselves the rigour of the law. The law was precise and definite: it admitted no evasion, no mediation, no compassion. When the crime was proved, nothing remained but to carry the judgment into execution[u]. The only variation was in the manner of the punishment, which was inflicted separately on the man and the woman, that even their death might not be common[x]. If the daughter of a priest committed adultery, she was to be burned, and the adulterer, as the Jews interpret the law, was to be strangled[y]. If the adultery was committed with a virgin espoused, but not married, both parties were to be stoned by the express words of the law, and the satisfaction of the ardent passion of the lover is the reason assigned for this extreme severity[z]. If the adultery was committed with a married woman, the parties, according to the Jewish interpretation, were to be strangled; i. e. they were to be buried to their knees in dung, and, while they were in this position, a napkin was placed round the neck, and drawn tightly at both ends, until death ensued[a]. The milder penalty of strangling was considered a sufficient fulfilment of the sentence of the law, when its rigour was not enforced by the addition, Their blood shall be upon them, which was explained of the more painful death by stoning. It is the severer death however which is denounced upon Jerusalem as an adulteress, by the prophet Ezekiel, in the name of the Lord: I

[u] Orig. in Lev. Hom. xi. s. 2. [x] Cl. Alex. Strom. l. ii. s. ult.
[y] Lev. xxi. 9. Ainsworth, Patrick in loc. [z] Deut. xxii. 23.
[a] Patrick in Lev. xx. 10.

will judge thee as women that break wedlock are judged: they shall strip thee of thy clothes, and stone thee with stones[b]. The Jews also, in the time of our Lord, and in the case of the woman taken in adultery[c], recite the commandment of Moses that such should be stoned. This was however no more than the popular opinion of the age, and the different interpretations may be reconciled according to the suggestion of Grotius, by supposing that the increased prevalence of adultery called for the infliction of the heavier penalty[d].

These penalties were appropriated to cases of adultery in which the offence was clearly and distinctly proved. In more doubtful cases, in which the husband suspected the guilt of the wife, but could bring no other proof to justify his suspicions, than that the woman had been secreted with a man, with whom she was forbidden to associate, the trial by the waters of jealousy was provided, and God permitted an extraordinary appeal to be made to himself according to a ritual which is prescribed[e]. If the woman, under the apprehension of this ordeal, confessed her guilt, she was discharged, with no other penalty than the loss of her dowry. If she persisted in maintaining her innocence, and had the confidence to appeal to the Deity in her vindication, she was to be brought to the door of the congregation, and the priest, after various ceremonies suited to her condition, and a form of imprecation which was prescribed, and which the woman in the most

[b] Ezek. xvi. 38, 40. [c] John viii. 5. [d] Lowth in Ezek. xvi. 40. [e] Numb. v. 11—31.

solemn manner appropriated to herself, caused her to drink the bitter water, which, if she was guilty, caused her death; and it was the received opinion of the Jews, that the adulterer also died, at the same time, and in the same manner. If the woman was innocent, the waters had no effect: and their power was also suspended, if the husband was guilty of adultery, for his marital integrity, or guiltlessness from iniquity, was a principal condition of the divine interposition in his favour. If the woman, after her acquittal, should be again suspected of a criminal intercourse with the same man, she could not be again submitted to the same trial, nor was she liable to any punishment except divorce, with the loss of dowry. The trial might however be repeated, if the woman was married to another husband, or was suspected of intimacy with another man. This was to the husband a permissive, not a preceptive, law, and, during the long continuance of its duration, God shewed himself at once the protector of the innocent, and the judge of the guilty: and while he punished the adulteress by an extraordinary interposition of his power, he resisted the vain surmises of jealousy, and suffered not the unfaithful husband to revel in impunity, or to obtain the redress which he desired. The prophet Hosea is supposed to allude to a judicial suspension of the power of the bitter waters in the refusal of the Lord to punish the Jewish wives when they should commit adultery[f]. Our Lord also, in the case of the woman taken in adultery, in the posture of his body, in the action of

[f] Hos. iv. 14.

writing on the ground, and in his allusion to the sinless character of the accusers, has been shewn to act in strict conformity with the law of the bitter waters[g]. In his time the trial was inoperative, and the Jews, conscious that the failure of the trial was to be imputed to the prevalence of adultery, prohibited the appeal to the ordeal, and suffered not the sacred tetragrammaton to be invoked in vain. This law, most extraordinary in all its parts, was a strong proof of the divine legation of Moses, who, without an immediate revelation from the Deity, would never have indited the provisions of a law which involved no less than the promise of a perpetual miracle, of the operation and suspension of such extraordinary power and knowledge as proved the immediate interposition of God in the minutest affairs of the Jewish people, maintaining the authority of his laws by the judicial suppression or visitation of crime. When this law was finally superseded, if any man's wife excited his jealousy and suspicion, by secretly keeping company with another man, he might no more use her as his wife, and her dowry was forfeited[h].

In the latter times of the Jewish state, when, from the prevalence of the crime, and also from the subject condition of the people, the capital punishment was impracticable, other penalties, and some of a very strange nature, were substituted. "Extraordinary fasting was one, and indeed might well enough be expected: but who, except the Rabbins, could have

[g] See Lightfoot Hor. Hebr. in John viii. 6. [h] Patrick and Ainsworth on Num. v. Ux. Ebr. l. iii. c. 13. Tebbs's Essay, s. 1.

thought of exposing the adulterer naked, if it were summer, to the flies and wasps, and of steeping him for a certain period, if it were winter, in cold water, up to the chin?"

In the countries adjacent to Judea, which may have derived a casual instruction from the law of the Jews, adultery was by no means a venial offence.

Abimelech the king of Gerar, and Pharaoh the king of Egypt, were threatened with death if they attempted the virtue of Sarah; Joseph also was thrown into prison upon the false accusation of the wife of Potiphar: and by the ancient laws of Sesostris, the adulterer and the adulteress were burned alive. In a later age, adultery by consent was punished in the man with a thousand stripes, in the woman by the loss of her nose[k].

The prophet Jeremiah has left a record of the extreme punishment of adultery in Babylon: The Lord make thee like Zedekiah and like Ahab, whom the king of Babylon roasted in the fire, because they committed adultery with their neighbour's wife[l]. This punishment is explained of being roasted by a gentle fire; and it is maintained in the traditions of the Jews, that the persons thus punished were the elders, who attempted the chastity of Susannah.

In ancient Armenia the adulterer was put to death as an enemy, not for the simple fact of the adultery, but from its tendency to deprive the husband of the affections of his wife[m].

[j] Nuptiæ Sacræ, or an Inquiry into the Scriptural Doctrine of Marriage and Divorce, p. 10.

[k] Ux. Ebr. l. iii. c. 12.

[l] Jer. xxix. 22, 23. Lowth in loc.

[m] Xen. Cyrop. l. iii. c. 1.

In Greece, in times of remote antiquity, it is probable that the husband of the adulteress sought his own revenge, as in the fabulous legends of Atreus and Phasis. The language which Homer[n] has put into the mouth of Hector, that a coat of stone would be a proper recompence of the deeds of Paris, has been thought to imply that the adulterer might be stoned to death. The Trojan war was no more than an act of private vengeance upon adultery, considered chiefly as an invasion of property, and was carried on for the recovery of the dower[o]. Upon the same principle rich adulterers had the liberty of redeeming themselves by a fine, called μοιχαγρια, and paid to the husband of the adulteress: the woman's father also returned to the husband the dower which he had received of him, and for which he was indemnified by the payment of the adulterer. Another punishment was the loss of sight, a retaliation upon the sense which was supposed to admit the first incentive of unlawful passion. This punishment was retained in a later age among the Locrians, whose legislator, Zaleucus, having detected his son in adultery, and refusing to remit any part of the punishment, at length consented to redeem an eye of his son with one of his own eyes; thus exhibiting an extraordinary example of the rigour of justice, and of the earnestness of paternal affection[p].

In Crete, in token of the effeminacy of their character, adulterers were clothed in wool, and conducted in that dress to the house of the magistrate,

[n] Il. γ. v. 57. [o] Millar's Origin of Ranks, p. 69. [p] Potter's Antiq. b. iv. c. 12.

who passed on them a sentence of ignominy, which deprived them of their civil privileges, and of all share in the public administration[q].

In the simple manners of the ancient Spartans, either adultery and its punishment were unknown, or the severity of the penalty prevented the offence[r].

Among the Athenians the punishment of adultery was originally arbitrary, and with the exception of death, left to the discretion of the magistrates. Thus the Archon Hippomanes, having detected his daughter in adultery, yoked her with the adulterer to a chariot, until the man died, when he confined his daughter, and she was starved to death. Draco permitted any man to mutilate or slay the adulterer whom he discovered in the fact, and to treat him as he pleased; a liberty which was first allowed by Hyettus, who had himself killed the man that had committed adultery with his wife. This licence was afterwards confirmed by Solon; and it forms the ground of the defence by Lysias of the murder of Eratosthenes, who had been detected in the very act of adultery, and acknowledging his guilt, intreated that his life might be spared, and that the fine might be taken in compensation of the injury. The husband refused to compromise the matter, and in defence of the death of Eratosthenes, appealed to the law, which permitted the husband to use his discretion, and acquitted him, under such circumstances, of the guilt of murder. He compared also the law

[q] Potter's Antiq. b. iv. c. 12. [r] Ibid. Ayliffe's Parergon, p. 46.

of ravishment with the law of adultery, and maintained, that in the former case the fine would be sufficient, because the ravisher would be hated; but as the act and address of the adulterer might enable him to appropriate the wife's affections, to obtain an ascendancy in the family, and to introduce a doubtful progeny, the penalty of death was justly awarded to the adulterer[s]. When a man was apprehended upon a charge of adultery, he was at liberty to appeal to the Thesmothetæ, and they referred the cause to proper judges, who might inflict any penalty short of death, and demand a pledge of chastity for the time to come. Another punishment peculiar to the Athenians, and inflicted chiefly on the poor, for the rich redeemed themselves by a fine, was the ῥαφανιδωσις or παρατιλμος, a strange compound of torture and buffoonery. It was also infamous for the husband to live with his wife after she had committed adultery; and it was unlawful for her to enter into the public temples, or to appear dressed in the streets. If she transgressed this law, it was in the power of any one to tear off her clothes, and to beat her, but none was permitted to kill her[t].

There are various conjectures concerning the ancient punishment of adultery at Rome. The point which is liable to the least dispute is the inveterate partiality of the law, in restricting to the man the right of accusation and redress, and in not suffering the woman to vindicate her wrongs. In the very infancy of the state it was ordained by Romulus,

[s] Lysiæ ὑπερ του Ἐρατοσθενους φονου απολογια.

[t] Ux. Ebr. l. iii. c. 16. Potter, b. iv. c. 22. Tebbs, s. 2. Patrick on Lev. xx. 10.

that if a husband detected his wife in adultery, he was free to put her to death, but the wife was not permitted to lay her finger on an adulterous husband[u]. Cato and the Twelve Tables allowed the same partial privilege, which was perhaps not inconsistent with a state of society in which the wife was the child, the slave, the property, of a domestic lord. The penalties of adultery were necessarily various and unsettled while they were thus left to the licence of private revenge, and to the arbitrary discretion of the father, as well as the husband, of the adulteress, who, according to their temper or caprice, would choose the punishment to be inflicted rather under the tacit connivance, than the express authority, of the law. It was thus that the father of the woman was allowed to kill both parties, if he detected them in the fact, provided he did it immediately, and slew both together, and, as it were, with one blow. The same power was not ordinarily indulged to the husband, but only when the crime was committed in his own house, in defiance of repeated admonitions, and with some mean and infamous person; although, if under other circumstances his jealousy impelled him to kill them, he would not be punished as a murderer. On many occasions however the revenge was satisfied with the mutilation of the offender. There is certainly no ground for presuming that the Romans were indifferent to adultery, and the imputation is disproved in the manuscript notes which Spence and Holdsworth have left upon Horace. It was the aggravation of the injury which Lucretia sustained,

[u] Aul. Gell. Noct. Att. l. x. c. 23. apud Gerhard.

that she had been treated as a slave, and, however the Romans might justify themselves in the liberties which they took with this unfortunate class of persons, nothing was more severely reprobated by them than the violation or corruption of the *free born* virgin or matron[x]. Rome was distinguished by the wise institution of a domestic tribunal, and if a wife was suspected of adultery, the grounds of suspicion were investigated before her husband and her own relations[y]: and such infamy was attached to the woman who was detected in an adulterous intercourse, that, although she was not condemned, although she was not accused, although she was acquitted, the very circumstance of her being detected was a legal impediment, under the Julian law, to her marriage with a man of ingenuous rank and condition[z]. The Roman law, says Montesquieu, in requiring the public investigation of the charge of adultery, was an admirable instrument of preserving the purity of manners: it excited the apprehension both of the woman and of those whose duty it was to be jealous of her virtue[a].

The right of private revenge was not abolished by the Julian law, although, in the strict interpretation of that law, the right was restricted to the father, to the exclusion of the grandfather of the adulteress[b], and an interval of sixty days was allowed to the husband to determine whether he would seek the redress which the law afforded[c]. Gibbon has nevertheless

[x] Gent. Mag. vol. xciii. pt. 1. p. 540. [y] Tebbs, s. 2.
[z] Brisson de Jure Con. [a] Esprit des Loix, l. v. c. 7. in Tebbs.
[b] Brisson de Jure Connub. [c] Tac. Ann. l. ii. c. 85.

remarked, that "the wisdom of Augustus, after curbing the freedom of revenge, applied to this domestic offence the animadversion of the laws; and the guilty parties, after the payment of heavy forfeitures and fines, were condemned to long or perpetual exile in two separate islands[d]," from which if they should venture to return, they might be slain by any man. Augustus however appears in several instances to have exceeded the rigour of his own laws, and to have visited the offence with death; and when the offence was committed with any woman of the reigning family he pronounced it an act of treason, and took advantage of the construction to remove many eminent citizens, whose influence excited his jealousy[e]. Tiberius conceived that the punishment of adultery was sufficiently guarded by the laws, and, in the case of Varilia, he deprecated the severer penalty of death; and pretending the authority of Romulus, who had ordained the divorce of the adulteress, banished her to the distance of two hundred miles from Rome, and prohibited the adulterer to approach either Italy or Africa. On another occasion he sent the adulterer and the adulteress into exile, thus depriving them of all civil privileges[f]. It was worthy of the general character of Domitian to affect an extreme severity against adultery, and even to degrade a Roman knight from the rank of a judge, for the offence of taking back his wife, whom he had divorced for adultery. It was in the same temper of arbitrary rigour that Macrinus caused persons

[d] Rom. Hist. c. 44. [e] Anc. Univ. Hist. vol. xiv. p. 132.
[f] Tac. Ann. l. ii. c. 50. l. iv. c. 42. with Brotier's notes.

who were convicted of adultery to be sown together in a sack, and burned alive; and that Aurelian published many severe laws against adultery, and put to death one of his own domestics for the offence. Under the Christian emperors adultery was made a capital crime, and assimilated to sorcery and parricide, to poison and assassination, to high treason and debasement of the coin. This was the law of Constantine: under Constans and Constantius adulterers were burned, or sown in sacks and cast into the sea: under Leo and Marcian the penalty was reduced to perpetual banishment and cutting off the nose. Under Justinian it was again permitted to kill the parties, if their intercourse had been forbidden, and was renewed in certain places: but at the same time, under the influence probably of Theodosia, the law was mitigated, at least in favour of the wife, who was only to be scourged, to lose her dower, and to be confined in a nunnery for two years, at the expiration of which her husband might receive her, but if he refused, she was to take the veil for life. It still remained a capital offence in the husband[g]. There is also the record, of which some of the circumstances are disputed, of a penal and public constupration of the adulteress, which was very properly abolished by Theodosius. In some cases the adulteress was banished, and her goods confiscated: and while it was the received opinion of the Jurists, that to kill the parties was a lawful act, as far as the courts of law were concerned,

[g] Ayliffe's Parergon.

it was held to be unlawful in the conscience, and even a deadly sin[h].

The writers of the New Testament make no mention of the punishment of adultery, but in the denunciation of its infinite and eternal doom. The primitive writers pursue the same course. Clemens of Alexandria is the first of the fathers who takes notice of the punishment of adultery, comparing the capital judgments under the Mosaic law with the spiritual death incurred by the adulteress who does not repent[i]. Origen takes up the same argument, and dwells on the lenity of the ancient law in inflicting the capital punishment as a perfect satisfaction for the sin, and the virtue of the Gospel in restraining crime by proposing the final vengeance reserved for the offender who sins without repentance[k]. He argues in another place that the law, with its threats of corporal chastisement, was adapted to a state of infancy, but that the Gospel, which is addressed to men of perfect age, denounces heavier judgments. Under the law the adulterer and the adulteress were not threatened with hell, or with eternal fire, but were to be stoned with stones. But the adulterer may now say, Oh! that the sentence of the former law had been pronounced concerning me, that I might be stoned with stones, and not reserved to the eternal fire[l]. In proof that things are evil, not in themselves, but in their modification and use, he instances the murder of the adulterer, and affirms,

[h] Ux. Ebr. l. iii. c. 12. Anc. Univ. Hist. vol. xiv. p. 132. vol. xv. p. 344, 461. Enc. Brit. Art. Adultery. [i] Strom. l. ii. ad fin. [k] In Lev. Hom. xi. s. 2. [l] In Jer. Hom. xviii. ad fin.

that if any man slays the adulterer detected in the crime, and demands the punishment of the offence, he does not evil[m]. Writers of a later period advert to the capital punishment of the offence in the secular courts, where men who through the frailty of their nature are prone to passion and the allurements of pleasure, nevertheless punish adultery by law, and inflict capital punishment on such as they convict of invading the rights of the genial bed[n]. This recognition of the capital penalty may be added to the other proofs of the late age of the several writings falsely attributed to Clemens of Rome. The Apostolical Constitutions speak in express terms of the conviction and capital punishment of the adulterer[o]; of the expulsion of the woman from the house before her condemnation[p]; and of the secession and rejection of adulterers from the communion of the Church[q]. In the Apostolical Canons the imputation of adultery is justly made the ground of exclusion from the sacred order[r]. The truth is, that in the primitive times "the punishment of adultery was very great; perpetual penance all a man's life, and scarce being admitted into communion at the very hour of death: till Pope Zephyrinus, about the year 216, considering the great inconveniencies of so much severity, persons being hereby often driven into despair, and others discouraged from coming over to the Christian faith, ordered that penance in this case should be limited to a shorter time, which

[m] De Rect. in Deum Fide, s. 4. [n] Arnob. Adv. Gentes, l. iv. s. 23. [o] L. v. c. 2. [p] Clementin. Hom. iii. s. 28. [q] Ibid. s. 69. [r] Can. 53.

being ended, such persons might be received again into the bosom of the Church. This decree gave great offence to the African Churches, most whereof stood up for the strictness of the ancient discipline. Tertullian more especially inveighs against it with much bitterness and animosity, as a thing unfit in itself, and an innovation in the Church. The same Cyprian also plainly intimates, though he himself was for the more mild opinion. By the Ancyran council, held A. D. 315, it was decreed, that whoever was guilty of adultery should be punished with a seven years' penance before they were admitted to the communion. By the synod of Illiberis, if a man, after having done his penance for the first fault, fell afterwards into the same sin again, he was not to be taken into communion, no, not at the hour of death. Saint Basil, writing to Amphilochius rules for the conduct of discipline, and measures of repentance, sets adultery at fifteen years' penance, and then to be admitted to the holy sacrament. His brother Gregory, Bishop of Nyssa, treating about the same affairs, appoints fornication to be punished with no less than nine years' penance, and suspension from the sacrament; and adultery, and all other species of uncleanness, with double that time, though allowing a liberty to the spiritual guide to contract this time, as the circumstances of the case or person might require. But both these last mentioned being but private bishops, their canons could be no further obligatory than to those particular dioceses that were under their charge. And indeed their censures of the Church in this case did much vary according to time and place, in some

more rigid and severe, in others more lax and favourable, though in all such as did abundantly shew what hearty enemies they were to all filthiness and impurity whatsoever[s]." In the progress of ecclesiastical discipline, a penance of seven years was imposed upon a layman, and of ten years upon a clergyman, who should be convicted of adultery; which, however, admitted of a pecuniary compensation: the woman was also excluded from a second marriage, that she might perform a penance coextensive with her life[t].

The discipline of the Church was, however, necessarily feeble, without the aid of the secular power, and the favour of the emperors towards the bishops by whom they had been converted, soon admitted them to a share of the temporal jurisdiction. The administration of the law concerning marriages and bequests, which had formerly belonged to the pontifices, was transferred to the Christian bishops, to whom it was thought that the law of marriage, which was in itself a religious rite, and to which from the apostolic age the consent of the bishop had been required, was especially appropriate; and the bishops maintained their title to this judicial authority, by their learning, their knowledge of the laws, and by the part which they took in the compilation both of the civil and canonical code. Thus adultery fell under the episcopal jurisdiction; and it cannot be denied that there is a reasonable analogy between a divine institution and ecclesiastical cognizance of its

[s] Cave's Prim. Christianity, pt. 2. c. 5. [t] Ayliffe's Parergon, p. 47, 48.

violation, although, in other respects, adultery is no more sacrilege in the Church than it is treason in the state. For a long period, however, the bishops governed by no other laws than those of the empire, or of the several nations in which they resided; and hence arose the different penalties inflicted upon adultery in different countries. Such was the origin of the separate and concurrent jurisdiction of the secular and ecclesiastical courts, in cases of matrimonial law[n]: adultery was an ecclesiastical offence, because it was tried by ecclesiastical judges, to whom the authority was originally delegated by the civil powers, and from whom, especially wherever they have been removed from the superintendence of their own courts, the whole trial of adultery would not be improperly remanded to the jurisdiction of the criminal courts. As a crime of a very aggravated character, adultery challenges a criminal and penal prosecution; and with an uniformity which marks the sense of mankind, it has been tried and punished as a crime, in all quarters of the globe, with penalties relatively varied, according to the estimation in which woman is held, and the views which are taken of the nature of marriage.

In the practice of the Mahometans, adulterers and adulteresses are stoned to death. The authority for this punishment is not extant, and in the execution of the sentence the evidence of four witnesses is required to substantiate the charge, and a false accusation subjects the accuser to corporal punishment, and renders his testimony invalid for the future. By

[n] Ayliffe, p. 52. Nupt. Sacr. p. 125.

another law it is ordered, that the parties shall receive a hundred stripes; that they shall be interdicted from marrying with a Mahometan; and that the woman shall be confined till she die or repent[x]. Among the Druses adultery is but rarely punished with death, notwithstanding their natural jealousy. If a wife is detected in the crime she is divorced, but the husband is afraid to kill her seducer, because his death would be avenged, for the Druses are inexorable in the retaliation of blood, and because, if the governor should hear of the affair, he would ruin both parties by his extortions[y]. Among the Nesserie or Ansari of Syria, whose religious tenets are deduced from Heathen, Jewish, Turkish, and Christian sources, and with whom marriage is altogether a matter of sale, adultery is not severely punished: if a man can prove his wife to be guilty of infidelity, he repudiates her, takes back from her parents the price which he has paid for her, and if he likes, marries another a few days afterwards. The adulterer is obliged to marry the woman who is forsaken, or to absent himself for a year and a day: but the woman is punished with death if she has been intimate with a man not of her own nation[z]. In Arabia adultery is a capital offence, and the process of examination is curious when the husband is the accuser. The man swears five times that the allegation is true; and he adds an imprecation that he may be cursed by God if he lies. If the woman swears as

[x] Mod. Univ. Hist. vol. i. p. 396. Ux. Ebr. l. iii. c. 12.

[y] Burckhardt's Travels in Syria.

[z] Lit. Gazette, No. 406. From Dupont's Memoir of the manners and religious ceremonies of the Nesserie.

often, and adds a prayer that God may destroy her if her asseverations are not true, she is usually believed. If she is convicted, the husband has her life in his power, and may in his vengeance put her into a sack full of stones and drown her. The punishment of the adulterer is ridiculous. He is condemned to ride on an ass, with his face towards the tail, which he uses as a bridle; his head is crowned with the entrails of a beast, and his feet are bastinadoed[a].

Among the Tartars, adultery, which is very unusual, is punished with death. In the tribe of Kokant Tartars in Central Asia, adulteresses are buried in the earth up to the breast, and stoned by the people[b]. Adultery is also a capital offence by the laws of Genghis Khan, the founder of the Mogul empire.

There are various opinions on the punishment of adultery in China, where it is affirmed by some, and denied by others, to be a capital offence. In Pekin the dowers of convicted adulteresses are bestowed on the hospitals and female orphans: but in the province of Petane, noble criminals may choose whether the poignard or the bow-string shall expiate their offence. In some parts the adulteress is sold into slavery. It is an extraordinary practice of the celestial empire, not only that husbands lend their wives, but that parents contract with the suitors of their daughters, that in consideration of a valuable present, they shall possess a certain extent of matrimonial licence. If this precaution is not taken be-

[a] Tebbs, p. 174. [b] Gent. Mag. vol. xcii. pt. 2. p. 158.

fore marriage, the husband may inflict corporal punishment on the wife who transgresses, or divorce her: and if the adulterer has committed any violence, he is liable to pecuniary or corporal punishment, at the discretion of the judge before whom he is brought[c].

In Japan the husband may take the life of the adulteress. If she is detected in familiar conversation with another man, the offence is esteemed to be such, as neither banishment, nor confinement, nor any penalty short of death, can compensate: and the law is so rigorously enforced, that the Japanese women have been known to commit suicide, to prevent discovery: the woman only is punished for the crime[d].

In the Marian Islands, on the contrary, the offence is not punishable in the woman: but if the man offends, the wife and her relations waste his lands, and turn him out of the house. In Ceylon, adultery is so common that hardly a native woman is innocent: the law nevertheless proclaims the offence to be capital, but is probably more rigorous in the threat than in the execution[e].

In some parts of continental India, it is said, that a wife may prostitute herself to any man for the price of an elephant, and that it is no common glory to be held in so high estimation[f]. Adultery is, however, so far from being a venial offence in the continent and peninsula of Hindostan, that every violation of the compact of marriage is fol-

[c] Mod. Univ. Hist. vol. viii. p. 174. Tebbs, p. 178.
[d] Tebbs, p. 175. [e] Enc. Brit. [f] Ibid. Tebbs, p. 176.

lowed by a loss of caste, compared to which, the loss of life is in India scarcely considered as a punishment. Their legislator Menu says, A married woman who violates her duty to her lord, brings infamy on herself in this world, and in the next shall enter the womb of the shakal, or be affected with elephantiasis and other diseases which punish crimes. In some parts, fines of various amount are levied upon the adulterer, and the woman's ears and nose are cut off: but in general adultery is so criminal, that rather than the offenders shall escape punishment, their own brothers will not scruple to take away their lives, and the act is not punished but approved[g]. Among the tribe of Rajah-poots the offence is punished with death[h]. The Shaster is every where full of nice discriminations of comparative guilt, and especially in respect of matrimonial crime, and the penalties of adultery naturally vary with these discriminations. If the adultery be committed with a woman of inferior caste, and by force, the possessions of the adulterer are confiscated, his person is mutilated, and he is carried round the city on an ass: for adultery with a woman of inferior or equal caste, and by fraud, the adulterer forfeits his estates, is branded on the forehead, and banished the kingdom. These laws of the Shaster apply to the higher castes. If a man of low caste commit adultery with a woman of high caste, he is tied on a hot plate and burned to death; while the adultery of the higher

[g] Monthly Rev. vol. cvi. p. 416. Mod. Univ. Hist. vol. vi. p. 247.

[h] Dubois' Letters on the State of Christianity in India, p. 202.

with the lower castes may be compensated for a trifling fine. A Brahmin suffers only the loss of his hair: but the wife of a Brahmin is subject to severe discipline if the crime be committed with the higher castes; and if she offends with a lower caste she is punished by the loss of her hair, a nauseous unction, and a procession on an ass through the city, from which she is sent out on the north side, or, as some writers affirm, is delivered to be devoured by the dogs[i]. In these penalties the degradation of the offender appears to be contemplated more than the criminality of the act. In the following passage the circumstantial proofs of the crime are very correctly enumerated: "If a man should use equivocal expressions to another man's wife, or eye her with amorous looks; or if he should hold conversation with her at a time or in a place when or where he ought not to have been speaking with her—any instance of this sort is to be regarded as a crime, in the first or lowest degree. Or if a man, with the view of seducing the wife of another, should send her fragrant sandal powder or flowers, such as jessamine, or perfumes, or jewels, or wearing apparel, or edible fruits; if any of these circumstances be proved against him, it is a crime in the second or middle degree. If a woman and a man should meet in a secret place, or should embrace one another, or if they should sit together on a bed, or remain together in a dark place, or if he should converse with her, handling her hair at the time, or should wound her breast with his nails, or her lips with his teeth, or should untie the

[i] Tebbs, p. 177.

knot of her cloth; if any of these circumstances should be proved, the crime imputed is to be inferred[k]."

Thus, throughout the vast regions of Asia, and in the infinite variety of its tribes, among Mahometans, Tartars, and Hindoos, from Arabia to Japan, there is one prevailing abhorrence of adultery expressed in a general avowal of its capital punishment. The chief exception is found among the Mingrelians, with whom marriage is nothing but a bargain and a sale, and adultery is satisfied with the forfeiture of a hog, which is eaten in good fellowship between the adulterer, the adulteress, and the injured husband[l].

Africa is possessed with the same abhorrence of adultery. In Æthiopia the crime is avenged by the excision of the adulterer's nose. In Abyssinia the violation of conjugal fidelity on either side is compensated by a fine or present, equivalent, at least in the judgment of the injured party, to the wrong; and as the husband and the wife have each their separate property, they are in a condition to make the compensation required. Where the compensation cannot be agreed upon, the woman is usually punished with the most severity, being condemned to forfeit all her goods, to quit her husband's house in a mean and ragged attire, under an express condition that she is not to return: she is allowed to take with her a sewing needle, that she may maintain herself; and her head is sometimes closely shaven, with the exception of a single lock on the forehead,

[k] Strange's Elements of Hindu Law, vol. ii. p. 36. Month. Rev. Jan. 1826. [l] Enc. Brit.

which only increases the disguise. This treatment depends on the will of the husband, who may receive her again, and upon whose refusal both parties are free to marry again. On the contrary, if the husband be the offender, he and the partner of his offence are liable to a penalty, which seldom exceeds a fine upon both parties, which is appropriated to the complaining wife. If the adulterer is convicted, he is required to pay a fine of forty horses, cows, suits of clothes, &c. and if he is not able to pay it he remains a prisoner with the husband at his discretion till the fine is paid, and is not released but upon condition of fetching what will satisfy him, when the adulterer procures wine and cow's flesh, which they eat and drink together, and, upon the adulterer's asking pardon of the offended husband, one and another part of the fine is remitted till the whole is discharged[m].

In the kingdom of Benin, on the western coast of Africa, there are three different punishments of adultery. If a husband, of the meaner class of the people, suspects the fidelity of his wife, he tries every method to surprize her in the fact, without which he has no power of inflicting any punishment but ill usage. If he succeeds in detecting the intrigue, he immediately becomes possessed of all the property of the adulterer: the offending wife is beaten with a cudgel, driven out of the house, and left to seek her fortune, which usually ends in misery. Among persons of higher rank, the crime is satisfied by a sum of money, which the relations

[m] Mod. Univ. Hist. vol. xv. p. 79.

of the woman pay to avoid the scandal of the adultery, and after the payment of which the woman passes with her husband and all her acquaintance for a woman of virtue in proportion to the sum received by the husband. The governors punish this crime with the utmost severity. Both the adulterer and the adulteress are immediately put to death, if they are taken in the act: their bodies are thrown upon dunghills, a prey to the birds and beasts, without process of law or form of trial. The result of this severity is, that adultery is less frequent in Benin than in any other country[n].

Adultery is also rare among the Caffres, with whom it is severely punished in the woman, but little regarded in the man[o].

The wild tribes of America have also their notions of the criminal character of adultery. In Mexico the adulterer was stoned to death[p]. In the tribe of Omawhaws, near the Rocky Mountains, where the marriages are very irregular, and a whole family of sisters are married in succession by the same man, many husbands will connive at the infidelity of their wives, or be satisfied with some slight punishment, but others will brand or mutilate, and then repudiate, them[q].

Of the sentiment which has been entertained in Europe upon the criminal character of adultery there is the earliest, the most continuous, and the most copious evidence. Tacitus has left his record of the ancient Germans, that adultery was very unusual in

[n] Ibid. vol. xvi. p. 369. [o] Enc. Metrop. [p] Tebbs, p. 173.
[q] Month. Rev. vol. ci. p. 347.

so populous a nation, and that the punishment was instant, and at the discretion of the husband. The woman was shorn of her hair, stripped naked, and, in the presence of her relations, turned out of the house by her husband, and driven with a scourge through every village; for there is no pardon of prostituted chastity: the woman that is debauched will not find a husband by beauty, age, or wealth. No one there laughs at vice, nor is it the fashion to debauch and to be debauched[r]. This severity of the ancient Germans has had a long hereditary influence.

By the ancient laws of the Burgundiones, a Vandal tribe, the adulterer and the adulteress were both to be put to death: the excision of one only was an offence, for which a fine would be demanded[s].

In Poland, before the establishment of Christianity, adulterers were placed in a condition of exquisite torture, in which they had no alternative but to perish or to mutilate themselves[t].

The ancient Swedes and Danes left the punishment to the discretion of the injured husband, who might kill the wife, and mutilate the adulterer. In Bohemia, adultery was in the strictest sense a capital offence, and the offenders were beheaded. In the seventeenth century the divines of Strasburgh prevailed on the magistrates to inflict a capital punishment on adultery; and the writer who records the fact, regrets that the divines of the Low Countries had not been more vigorous in the denunciation of adultery, which in Belgium was only punished by a fine[u].

[r] Tac. Germ. s. xix. [s] Brotier, Ann. ad Tac. Germ. s. xix.
[t] Enc. Brit. [u] Tebbs, p. 169, 172.

The ancient laws of France usually prescribed for adultery severe flagellation, with public exposure, which might however be commuted by a fine more or less considerable. The public exposure was of a serious kind: the parties were severely whipped as they ran through the town in opposite directions, either naked, or with no other covering than decency required. The laws made a distinction between married and unmarried persons, inflicting the punishment only on the former; nor was the punishment inflicted at all, unless the parties were taken in the act; although suspicious circumstances, especially after admonition, would render them liable. In some places, if they were surprised in the act, they were tied together to receive the merited castigation; and in others, on the repetition of the offence, the punishment was augmented in proportion, at the discretion of the judge, and banishment for various periods, extending to life, was added to the fine and the gauntlet. This rigorous discipline gradually fell into disuse, and adultery obtained such impunity as was not disturbed by one or another example of severity, which was sufficiently counteracted by the want of accusers, the ignominy attached to the accuser, and the difficulty of proving the accusation[x]. Under the Code Civil, the adulteress who shall be convicted on the accusation of her husband, shall be liable to imprisonment for a period of not less than three months, or more than two years, which may be reduced by the husband's consenting to receive her: the accomplice of the adul-

[x] Tebbs, p. 157—169.

teress shall be liable to the same period of imprisonment, and to a fine, varying from one hundred to two thousand francs. The husband who shall keep in his house a woman with whom he has committed adultery, shall be liable, on the complaint of his wife, to a fine, varying from one hundred to two thousand francs, and shall be incapable of prosecuting his wife for adultery[y].

In Spain, adultery was formerly punished by mutilation; by fine, which was doubled if both parties were married; and by scourging, if they were unable to pay. In the draft of the Penal Code submitted to the Cortes, adultery on the part of the wife was to be punished by seclusion, for as long a period as the husband should desire, provided it did not exceed ten years: her accomplice was to undergo the same punishment, with the addition of exile. Adultery by the husband was to be punished with infamy.

The laws of Lucca, in Tuscany, made adultery punishable by fine and banishment for a year. A law of Sicily condemned the offender to be burned, even although it could be proved that his crime was not aggravated by seduction. Joseph Scaliger says that he was at Geneva when a very handsome young woman was drowned for this offence[z]. Beza, in his Treatise of Divorce, was earnest in pressing the magistrates to do their duty, and by inflicting the capital penalty on adultery, to remove the difficulties of divorce.

In investigating the penalties of adultery in Eng-

[y] Code Penal, Art. 336—339. [z] Tebbs, p. 172.

land, as derived from our remote progenitors in Germany, the law of the Visigoths will be found in singular conformity with the law of Solon. If any woman shall commit adultery, and not be detected in the fact, her husband may accuse her before the judge; and if she shall be convicted upon sufficient evidence, she and the adulterer shall be delivered to the will of the husband, who shall not be guilty of homicide, although he shall kill both the adulterer and the adulteress[a].

In ancient Saxony or Westphalia, the adulteress was sometimes compelled to hang herself, and over her ashes was erected a gibbet, on which the adulterer was also hanged. At other times, the women assembled in a body, and scourged the adulteress through all the neighbouring villages, lashing her, cutting off her garments, piercing her with their knives, and sending her bleeding and covered with wounds from village to village, where were always found new bodies of flagellants, actuated by zeal for modesty, until the woman was left half dead, or hardly alive[b].

It has been said, that "as to what our native savages thought of this matter, it is useless to enquire. The Anglo-Saxons afford some glimmering of legislation concerning it. By the laws of Ethelbert, the adulterer paid a fine to the husband, and bought another wife for him! Alfred fixed the fine at one tenth of the offender's property, and the fine was known by the expressive name of Lecherwite[c]."

[a] Brotier Ann. ad Tac. Germ. s. 19. [b] Ibid. [c] Nupt. Sacr. p. 119.

King Edmund the Saxon ordered adultery to be punished in the same manner as homicide: and Canute the Dane ordained, that a man who committed adultery should make such satisfaction as the bishop should enjoin, and be afterwards banished; and that the woman should have her nose and ears cut off[d].

"After the Conquest, the benefit received by government from the fines upon adultery, is evident from Domesday-Book, where the levying of them is frequently mentioned. But though that foreign subjection was in its own nature productive of the papal jurisdiction among us, and though it occasioned that first separation of the spiritual and temporal courts, which was so hostile to the genius of our Saxon judicature, yet it does not appear that ecclesiastical punishment, free from the control of the crown, was as yet applied to adultery[e]." On the contrary, William made the offence capital in the adulteress, and took away the jurisdiction from the bishops, whom he did not suffer to implead, excommunicate, or visit with any ecclesiastical punishment, his servants, or tenants in chief, upon a charge of adultery. The offenders were tried in the Leet, which is a temporal court, and upon conviction were fined, and the fines were paid into the Exchequer, unless the offence was committed in Kent, when the king received the fine of the adulterer, the archbishop of the adulteress. The lords of some manors had also the privilege of punishing the offenders within certain

[d] Ayliffe's Parergon, p. 52. Enc. Brit. [e] Nupt. Sacr. p. 120.

limits, and of appropriating the fines to their own use. Thus the temporal and spiritual courts took cognizance of the offence by turns, and without contention, until the right of the pecuniary mulct came into dispute[f].

In the reign of Henry I. adultery was punished by the loss of sight and mutilation, which was demanded in correspondence with the infliction of the capital punishment on the woman, and which, in the reigns of John and Henry III. as appears from letters still extant, directing inquisition to be made, was exercised by the husband, upon condition that he had previously forbidden the intercourse of the offenders[g].

"The distinct exercise of the ecclesiastical judgment was, after an interval of great turbulence, and the most dangerous encroachment, settled by Edward I. While he guarded the rights of his own crown, so lately violated, he surrendered to the clergy the cognizance of things 'that be mere spiritual,' and gave his permission that in all cases of 'penance enjoined by the prelates for deadly sin, as fornication, adultery, and such like, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.' And this seems to have continued in force till the Reformation. It is only necessary to observe upon it, that the original punishment inflicted upon the Church was corporal, and that it soon came to be commuted for money. But by an auxiliary provision of Edward II. it was ordered, that if the Church decreed a fine in the first

[f] Ayliffe, p. 52. [g] Ux. Ebr. l. iii. c. 12.

instance, preferring the money to a proper punishment, the king's prohibition immediately took place. And this shews us the true intention of the legislature, in surrendering to the Christian courts this branch of public punishment, which had formerly benefited the Exchequer by its impure produce: it was conceded, for the sake of repressing public licentiousness, by the characteristic punishment of personal exposure and disgrace. That this was the object has been more fully proved since our renunciation of popery, by the projected Reformatio Legum; by the Canons of 1640; by the injunction of King William; and the regulations under Queen Anne: for it was the declared intention of these provisions, though indeed they are not now in force, that no commutation should be allowed, except for very weighty reasons and in very particular cases[h]."

The sentiments of the English Reformers may be collected from the project entertained in the reign of Edward VI. when the commissioners met, by letters patent, for the purpose of digesting a reformed body of ecclesiastical laws; at which meeting were present, Archbishop Cranmer, Bishop Goodrich, and other bishops, with Peter Martyr, and other eminent divines, together with the most distinguished canonists, civilians, and common lawyers, then in the kingdom. The laws then agreed upon against adultery were very severe; denouncing upon the guilty party nothing less than perpetual banishment or perpetual imprisonment. The adulterer was to restore to his innocent wife her dower, with a moiety

[h] Nupt. Sacr. p. 121.

of all his goods: the adulterous wife was to forfeit her dower and all legal claim upon her husband's goods. It appears, however, that the sentence might be mitigated by the reconciliation of the parties[i].

In the time of the great Rebellion it was proposed, that every minister convicted of adultery or fornication, should suffer death: but the cause of the clergy was undertaken by Sir Dudley Digges and many others, who would have these laws universal, and as great a punishment to be inflicted upon the laity, lest they might seem partial. Under the Protectorate the law was made universal; and an ordinance of Parliament enacted, that every person, as well the man as the woman, offending therein, should suffer death, as in case of felony, without benefit of clergy[k]. On the Restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness,

[i] Chr. Remembr. vol. ii. p. 748. Reform. Legum Eccl. De Adult. et Divort. c. 3, 4. The punishment on the clerical offender was highly aggravated: "Ordiamur ab Ecclesiarum ministris quorum vitæ præcipua quædam integritas esse deberet. Itaque si quis ex illis adulterii, scortationis aut incestus convictus fuerit, si propriam habuerit uxorem omnes ejus opes et bona devolventur ad eam et ad liberos, si qui sint ex eâ vel ex aliquo priore matrimonio legitime nati. Si vero nec suam uxorem nec liberos habeat, omnes ejus facultates arbitratu judicis vel inter pauperes dispertientur vel in alia pietatis officia conferentur. Deinde si quod illi beneficium fuerit, postquam adulterii vel incestus vel scortationis convictus fuerit, ex eo tempore protinus illud amittat nec illi potestas ullum aliud amittendi. Præterea vel in perpetuum ablegetur exilium vel ad æternas carceris pœnas deprimatur." c. 2.

[k] Ellis's Letters on Engl. Hist. vol. iii. p. 222. Month. Rev. vol. xciv. p. 464.

it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law, a law which has treated the offence of incontinence, and even adultery itself, with a great degree of tenderness and lenity, owing perhaps to the constrained celibacy of its first compilers. The temporal courts therefore take no cognizance of the crime of adultery otherwise than as a private injury[l]. The ecclesiastical courts, in pursuance of the authority expressly reserved to them at the Reformation, inflict their punishment, and the injured party has besides his private action against the offender for the temporal damage he has sustained[m].

There are however two cases in which the secular law interferes; aggravating the punishment of a clergyman convicted of adultery, and palliating the offence of homicide committed in retribution of adultery.

If a man takes another in the act of adultery with his wife, and kills him directly upon the spot, though this was allowed by the laws of Solon, as likewise by the Roman civil law, if the adulterer was found in the husband's own house; and also among the ancient Goths; yet in England it is not absolutely ranked in the class of justifiable homicide as in the case of a forcible rape, but it is manslaughter. It is however the lowest degree of it, and therefore in such a case the court directed the burning in the

[l] 4 Bl. Com. c. 14. [m] Nupt. Sacr. p. 124.

hand to be gently inflicted, because there could not be a greater provocation[n].

The ecclesiastical punishment of adultery was formerly excommunication in a layman, and deprivation in a clergyman: and since the Reformation three instances have occurred, all in the reign of Elizabeth, of the deprivation of clergymen for this offence. These instances are sufficient to prove that the force of the ecclesiastical law is in this respect allowed by the judges of the temporal courts[o]. By the statute 1 Henry VII. c. 4. it is further made lawful to all who have episcopal jurisdiction to punish priests, clerks, and religious men, being within the bounds of their jurisdiction, as shall be convicted before them by examination and other lawful proof, requisite by the law of the Church, of advoutry, fornication, incest, or any other fleshly incontinency, by committing them to ward and prison, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their trespass[p].

No objection will be made to these extraordinary penalties inflicted upon the clergy in the secular courts. In all other cases of adultery, or criminal conversation with a man's wife, though it is as a public crime left by our laws to the coercion of the spiritual courts, yet, considered as a civil injury, and surely there can be no greater, the law gives a satisfaction to the husband for it, by an action of tres-

[n] 4 Bl. Com. c. 14. [o] Ayliffe, p. 47. [p] Burn's Eccl. Law, Art. Lewdness.

pass for it, *vi et armis*, against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly diminished or increased by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connexion between them; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious.

Evidence may be given, in mitigation of damages, that the husband had criminal connexion with other women, or that he was not accustomed to treat his wife with tenderness and affection, or that they did not live together upon terms of harmony or cordiality; for the jury must collect from a consideration of such circumstances the extent of the wound which is given to the husband's feeling and happiness. It is now settled, that if the jury should be convinced that the husband consented to the infamy of his wife, they ought to find a verdict for the defendant. This is founded either upon the maxim, *volenti non fit injuria*, or upon consideration that the plaintiff, as a profligate *particeps criminis*, appears under too unfavourable circumstances to receive any countenance or protection in a court of justice. But if the husband's conduct does not prove actual consent, but only that degree of negligence or levity which probably contributed to the seduction of the wife, it will not deprive him of a verdict, however it may lessen the damages. But he can maintain no action if he lives entirely separated from his wife, in consequence of a mutual agreement; for the gist, or

foundation, of the action is held to consist in the husband's loss of the comfort and society of his wife[q].

It is also provided by an early statute, 13 Edw. I. st. i. c. 34. that if a wife wilfully leave her husband, and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly and without coercion of the church reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action[r].

The practice of the English law of adultery is said to be an occasion of censure and offence to foreigners: and it is worthy of the most serious and dispassionate consideration, whether a crime second only in the divine law to that of murder; whether a crime which was pronounced capital under the law of Moses, which the Lord interposed his extraordinary power to prevent and to punish, and on which in the Gospel an eternal judgment is denounced; whether a crime which comprehends the worst fraud, the basest prostitution of character, and the most irreparable injury; whether a crime of which the just character is recognized in the penal inflictions of almost all nations, and in the right assumed or allowed in many of taking summary vengeance of the offender—can be rightly excluded from the catalogue of crimes and misdemeanours, and held to be a merely civil injury, for which a pecuniary fine

[q] 3 Bl. Com. c. 8. with Christian's note 12. [r] Burn ubi supra.

offers an adequate compensation? Is it agreeable with the recognition of a divine law to exempt from the charge of crime and the infliction of punishment a transgressor whom that law so plainly and so awfully condemns? Or is it consistent with the analogy of the English law to attach a criminal and felonious intention to a man who enters a shop or a dwellinghouse, and steals an article of inconsiderable value, and to impute no crime to the act of the adulterer, who robs a husband of his wife's affections, and a family of a mother's care? Or is there any thing in the class of civil injuries which bears any proportion to the wrong which the adulterer inflicts, a wrong which "injures the peace and happiness of society, and with which nuisances and assaults are not worthy to be compared[s]?" Even in the assessment of the damages it is not the guilt of the offender, or the wrong of the injured husband, but the variable and casual circumstances of the plaintiff and defendant, which forms the ground of the assessment, and "the price of adultery," as it has been called, is unsettled and indefinite, and modified by the wealth or poverty of the parties concerned. If the parties are poor, redress is almost impracticable, the damages are inconsiderable, and disproportionate even to the expence of recovering them: but is the offence or the injury abated? If the parties are rich and of elevated rank, the damages are enhanced: but how is the offence or the injury aggravated? If the parties are in different circumstances, the adulterer rich, and the husband poor, or the adulterer poor,

[s] Mr. Erskine. Woodfall's Parl. Rep. vol. lii. p. 232.

and the husband rich, upon what principle is the just measure of the fine to be ascertained? Is the rich man's wrong excused, because the adulterer is poor, or is the poor man's wrong aggravated, because the adulterer is rich? In such cases small damages would give impunity to the rich, and aggravated damages might tempt the poor to seek and triumph in their shame and dishonour. What a violation of all the principles of equal law is exhibited in these suits and prosecutions for criminal conversation. The injury is the same in the act, and in the effects which it produces: the penalty should be really, not relatively, equal: the criminal character of the act should be avowed, and the criminal should be punished without discrimination or distinction.

Another anomaly in the English law of adultery is, that the whole penalty of the offence, such as it is, is claimed to the man, and levied upon the man. The divine law pronounces the same judgment on the adulterer and the adulteress. In England the man pays the fine; the man seeks the redress: the injured wife has no remedy but in a suit of separation *a mensâ et thoro*, for the more complete divorce *a vinculo* she is not permitted to solicit: the adulterous wife undergoes no penalty beyond the forfeit of the right of dower, a sentence of divorce, in which, whether it be partial or complete, she rather rejoices than is aggrieved, and the loss of reputation. When her affections have been transferred from her husband, it is no additional grief that she is separated from him, and in respect of the scorn of the world, she defies it in the moment of her crime, and before she has time to feel or to fear its force it is satisfied,

abated, and withdrawn. The woman who has once ceased to respect herself is reckless of public opinion. The adulterer is received into society as a man who has done no wrong; the success of an intrigue on his part is applauded, by a wretched equivocation, as an achievement of gallantry: and it is not always that the adulteress is banished to the retirement which alone is suited to her shame, and in which alone she can retrieve her prostituted character. There is danger that on her repentance her sin may be forgotten, and that the ostentatious display of her recovery may counteract the just example of her disgrace.

Another objection to the present law of adultery is, that, while it exempts the guilty, it often, in its direct consequences, injures the innocent. A pecuniary fine is paid by the adulterer; but if he be a married man his wife and children are made partakers of his punishment. The price of adultery cannot be paid without diminishing their means of present subsistence and future establishment in the world. This is the effect of other offences which are compensated by fine; but, in those cases, the injury is not accumulated upon insult and neglect: however the property may be eventually injured, a design may have been entertained, unworthily, and with a dishonest intention, of promoting the interests of the wife and her family.

The last objection to the present law of adultery is, that it is a partial law. The unavoidable expences of obtaining redress for the civil injury are such as can be borne only by the opulent, and necessarily leave the destitute without any means of compensa-

tion. The natural effect of a law so partial in its operation is to expose the vices of higher life, and to conceal those of inferior station; to give to adultery the ostensible character of being the exclusive vice of the great, to charge them with "a monopoly of debauchery," and to represent them, in respect of adultery and its consequences, as "a privileged caste." While the man of humble station is left without legal redress under the worst of injuries, he is tempted to take the vengeance to himself, to be the judge of his own wrongs, and the executioner of his own sentence, in such rigorous and cruel treatment of his wife, and in such violence towards the adulterer, as have frequently ended in the effusion of blood, made murder the companion of adultery, and increased the number of public executions. In a case in which the exasperated jealousy of an ignorant man is too ready to mistake suspicion for the proof of guilt, it is especially necessary that the hall of the magistrate should be open to receive his complaint, and that the phrenzy of passion should be restrained by the assurance of a just and equal administration of the law.

Various remedies have from time to time been proposed for correcting these deficiencies and anomalies of the law of adultery: and it would be unjust to the present subject not to notice the highly interesting and instructive debates in Parliament[t], on the Bill for the prevention of adultery, debates in

[t] Woodfall's Parl. Reports, vol. xxii. p. 303, &c. Lords, April 4, 1800. vol. xxiii. p. 35. Lords, May 16. Ibid. p. 76. Lords, May 19. Ibid. p. 90. Lords, May 23. Ibid. p. 138. Commons, May 30. Ibid. p. 171. Commons, June 10.

which high principles were maintained upon the soundest reasoning, and recommended by the full force of professional character, experience, and reputation. It is not necessary at present to advert to that part of the Bill in which it was proposed to prohibit the intermarriage of the offending parties, and which may be reserved for future discussion. The inefficacy of the present law[u], the inadequacy of the existing penalties[x], the necessity of revision in conformity with general principles of legislation and the practice of other countries[y], and the expedience of recognizing the criminal character of adultery in order to secure its appropriate punishment[z], and to destroy the code of a peculiar caste[a], were either generally admitted or so feebly opposed as not to require defence. The law was in that state in which the lawyers regretted abuses for which there was no remedy, and collusion for which there was no punishment[b]: that damages could afford no compensation to a man for the injury which he sustained by the adultery of his wife; that there was an insidious pretence that damages could not be demanded or received without a sacrifice of honour; that there was a common understanding and collusion between the parties out of court, that the damages should not be exacted; and that even the award and payment of vindictive damages might offer a temptation

[u] Lord Eldon. (Lords Thurlow and Kenyon.) Sir W. Grant. Mr. Wilberforce. [x] Sir W. Grant. [y] Bishops Porteus and Horsley. Lord Eldon. Attorney General, (Law.) Sir W. Grant. Mr. Wilberforce. [z] Lords Eldon and Auckland. Sir W. Scott. Mr. Perceval. [a] Lord Auckland. [b] Lord Grenville.

to connive in the prostitution of a wife; and that wherever damages were desired, they were not deserved[c]. Upon these grounds it was proposed, that among other measures a criminal proceeding should be engrafted on the civil process; that the verdict of damages should be followed up by a criminal punishment of fine and imprisonment; that the prosecution should be by indictment before the grand jury, and carried on by the injured husband, after obtaining damages in a court of record. The fine and imprisonment would be a satisfaction to the public, and the damages were retained for the benefit of the poor man, upon whom the adultery entailed increased expences in the education of his children[d]. Thus a crime subversive of all morality and religion, and of the good order, rights, and happiness of civil society, would become subject to criminal jurisprudence[e]. It was the remark of Montesquieu, that the criminal law ought to be harmonious in all its parts. But if in the British code, renowned as it is for the wisdom and benevolence of its enactments, there did not occur any provision for punishing and restraining the vice of adultery, the code was in that respect defective, it contained an anomaly which was not desirable, and which it was the object of the proposed measure to remove. The best method of treating adultery was as a misdemeanor and a public wrong. Considered as a public wrong, it must at the same time be considered a private injury; and indeed there was no act of man on which the cri-

[c] Lord Eldon. Mr. Erskine. [d] Lord Eldon. [e] Lord Auckland.

minal code operated which did not involve a public wrong, as it implied a civil injury. Treason, robbery, assault, and battery were in their nature public wrongs, but they were also civil injuries. The crime of adultery was also a public wrong. Thus, while the rights of the individual are not merged in any general principle of jurisprudence, it was sought by the Bill not to divest the public of the means of correcting crime and punishing guilt. Adultery is lifted up by the common law and by our statutes into a public crime. Now with regard to adultery being considered a misdemeanor, it might be said, that most undoubtedly it did properly fall within that description. According to the laws of man, promulgated for the regulation and security of society; according to the laws of God, promulgated for the instruction and preservation of man; adultery was already a crime. But if these things were put out of view; if it were put out of view that the effect of adultery is to distract, and divide, and ruin families; if it were put out of view that it is a violation of the sacred ceremony of marriage; if it were put out of view that the order and succession of families, of that compacted and regulated state which constitutes and consecrates society, are disturbed and broken by adultery; still the vice is by law an indictable offence, and the measure in contemplation would do little more than give activity to the law. But looking at adultery as it affected society and families, what man was there who would not concur in considering it a most hideous crime? Adultery breaks up all domestic society; for the moment the mother loses the sense of moral obligation, children

relax in the observation of their duties. The violation of the marriage vow in either man or woman was a transgression of moral duty, and an enormous crime against God and society[f]. In this measure domestic peace, public morality, and conjugal fidelity, were prostrate at the bar of the House, and pleading for every thing that could cement human society, and endear and sanctify its ties[g].

The arguments in support of the measure were confirmed by the high reputation of its advocates, and by the authority of public and private character, which was found in the Bishops Porteus, Barrington, and Horsley; in the Lords Grenville, Auckland, and Eldon; the Attorney General, Law; the Master of the Rolls, Sir W. Grant; Hon. Thomas Erskine; Mr. Spencer Perceval; and Mr. Wilberforce. The general propriety of giving a criminal character to adultery was hardly denied: the chief force of the opposition was directed against the clause which prohibited the intermarriage of the adulterer with the adulteress; and that opposition was successful. Mr. Perceval nevertheless conceived that there had been a general admission of the criminal character of adultery, of the inadequacy of the existing law, and of the necessity of new measures to prevent and punish the offence; and he gave notice of his intention to introduce a new Bill upon the subject. Bishop Horsley also expressed his hope that the

[f] Mr. Erskine, whose opinions were fortified by a professional experience of thirty years, during which he had been concerned in all the principal actions for criminal conversation. See Parl. Rep. vol. lii. p. 234.

[g] Bishop Horsley.

attempt would be renewed: but the hope of the one has been disappointed, and the intention of the other was not fulfilled[h]. The English law of adultery retains its old character of being partial, ineffectual, and inadequate.

It may be that there was an unnecessary complication in the details of the contemplated measure, and under the doctrine of divorce which prevailed and continues to prevail, opinions were naturally divided on the intermarriage of the adulterous parties in the event of a divorce of the husband from the wife. A strong feeling was nevertheless excited throughout the country, and the minds of men were drawn to the great question of the criminal character, the penal prosecution, and public punishment of adultery. Among other suggestions which the occasion called forth, it was especially and very powerfully proposed, that the man should suffer imprisonment, and that the woman should lose her fortune and be placed in a state of moral control. "In the case of the abduction of a man's wife, public fine and imprisonment for two years are added to the recovery of private damages, and both

[h] "Efforts have from time to time been made for the amendment of a law, which as it stands at present operates as an inducement to the crime which it ought to prevent, and by its contrariety to Scripture is unworthy of a Christian country. A great and learned ornament of the law, it is said, once pledged himself in the House of Lords that he would use his utmost endeavours to render adultery by law a criminal offence. Every friend to the moral character of his country must wish him health and life and opportunity to redeem his pledge." Bishop Burgess. Greek Original of the New Testament asserted, p. xxxiii.

the king and the husband may have this action. Is the seduction of her so much lighter in guilt, that the Crown shall have no plea against it, and barbarity be imputed to those who would guard the marriage vow by a salutary increase of rigour against the invaders of it[i]." The crime of the woman requires a parity of punishment in proportion to her share of the guilt, and to the delicacy always due to her sex. But it was alleged, that her seclusion in a convent, as is the practice on the continent, and as is conformable with the ancient law of Justinian, was obviously impracticable in England; and it was urged with a chivalrous delicacy, that her imprisonment was not to be thought of for a moment. It was asked, therefore, whether in the case of the woman a penalty might not be copied from one of the ancient ordinances of France. "Might not a certain part of her fortune be retained for her decent maintenance, while the rest of it is forfeited? Might not the Lord Chancellor, or the Lord Chief Justice of the King's Bench, be appointed the official judge of her conduct? If she continued vicious, or drew impure gains from other quarters, might not the portion first awarded to her revert to her family? If there were appearances of contrition and a better behaviour, might not the judge have power to command from the husband a certain discreet addition to the allowance originally made? Here would be a sort of moral inspection, equally discouraging to the progress of viciousness and promotive of a returning sobriety[k]."

[i] Nupt. Sacr. p. 131. [k] Ibid. p. 135.

To the proposed imprisonment of the man there can be no objection: but is it not a fastidious gallantry, which recoils from the imprisonment of the woman? It is the practice of every day to commit the female misdemeanant: it is the specific punishment provided for the unmarried woman who gives birth to a bastard; and is there any ground for such a distinction of crimes and penalties, as makes adultery more venial than simple incontinence? The proposal of a moral inspection is worthy of all consideration: but in the accumulated labours which press upon the chiefs of the law, might not a private guardian, amenable to the courts, be preferable to an official guardian?

In the code of laws submitted to the Cortes of Spain, it was proposed to punish adultery by the seclusion of the adulteress, the imprisonment of the adulterer, and a sentence of infamy upon the husband who should be convicted of the offence. These were wise and manly suggestions, and may be applied to the improvement of the English law. The temporary seclusion of the woman, for a period to be limited by the aggravated or mitigated circumstances of the case, to be terminated by the consent of the husband to receive her again, and to be made perpetual on the repetition of the offence, might afford the best opportunities of moral inspection, and coincide with the popular opinion of the age in favour of a penitentiary discipline for the reformation of offenders. The degradation of the adulterer, under the same limitation, at the prosecution of the wife whom he has neglected, or the husband whom he has injured, to a state of infamy, which should only be

avoided by voluntary banishment, or commuted for imprisonment with hard labour, under which, as under the sentence of civil degradation admitted into the French code, and as a man of suspected character, he should be incapable of exercising any civil privileges, or holding any office of honour or emolument, under which his property should be liable to the maintenance of the adulteress, and otherwise inalienable for the time, after the deduction of his unavoidable expences, from his wife, and children, and lawful heirs, would be a revival of the virtual excision of the offender, of the true excommunication from all virtuous and honourable society. Such penalties would have no prejudicial effects upon the innocent; they would not suffer the guilty of either sex to revel in impunity; they would preclude the exhibition of a bold bad example; they would put redress in the power of all who are liable to the injury, and equally avenge the wrongs of the peasant and the peer; they would supersede all argument concerning the intermarriage of the parties; they would stamp the guilt and criminal character of adultery; they would reduce the man, who scruples not to call himself a man of honour, to his proper level with criminals and misdemeanants; and would counteract all the pretensions of superior address which the adulterer affects, by treating him as a man unworthy and incapable of exercising his civil rights, and take away the protection of the law from men who violate or invade the most sacred and most solemn obligations.

Other and severer measures have been proposed for the punishment of adultery, and continental

writers have not scrupled to demand the revival of the capital penalty, to insist upon the banishment of the offenders, and to make a change of abode, by which the bad example may be abated, the only condition of their intermarriage[l]. The law of Scotland still authorizes the capital infliction, although it has fallen into desuetude: but the penal abridgment of human life is at all times a matter of momentous consideration; and it is more just to the condition of humanity to maintain, and in the present state of society more easy to carry into effect, the principle, that whatever correction shall be applied to the evil, it shall be just sufficient for the purpose required; and while endeavours are used to repress offence, every possible opening shall be left both to repentance and to reconciliation. "If the punishment goes beyond the necessity; if in the violence of reform terror is heaped upon terror against the offenders, for morals too have their excesses, and virtue sometimes riots; it is easy to see the consequence. Society will grow universally depraved under a law superfluously rigorous[m]."

The true question is not whether adultery has obtained a predominance which calls for new penalties and restraints, but whether the present law of adultery is adequate to the prevention and punishment of a crime, than which none is more injurious to the peace of private life; none in its own nature more pregnant of complicated and aggravated villainy; none from whose contemplation the mind of man recoils with more aversion, or which is more opposed

[l] Gerhard, s. 622. [m] Nupt. Sacr. p. 137.

to the law and to the judgments of God. It is in periods free from the excesses and the irritations of crime, that legislation will proceed most securely, and that remedial and preventive laws will be devised with the most unbiassed wisdom, and opposed with the least of passion, prejudice, and interest. But before any revision of the law can be expected, it will be necessary to raise the tone of society in the mention of each and every kind of debauchery; to throw aside the levity which renders vice ridiculous, the compassion which supposes it venial, and the austerity which seems to hate the offender more than the offence; and to counteract the licence of declamation, which, in making the worse appear the better cause, softens the odious character of adultery, confers a heathen divinity on the adulterer, and exhibits him in all the graces of the god of love. It will be necessary to denounce adultery in its proper character, not as a civil injury capable of pecuniary redress; but as the abandonment of all honour; the violation of the most sacred rights: a crime against society; a sin against God: overlooked by the partial vengeance of human laws, but liable to the awful sentence of everlasting doom: ADULTERERS GOD WILL JUDGE.

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